

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. [REDACTED] 298

THE STATE OF TEXAS, APPELLANT,

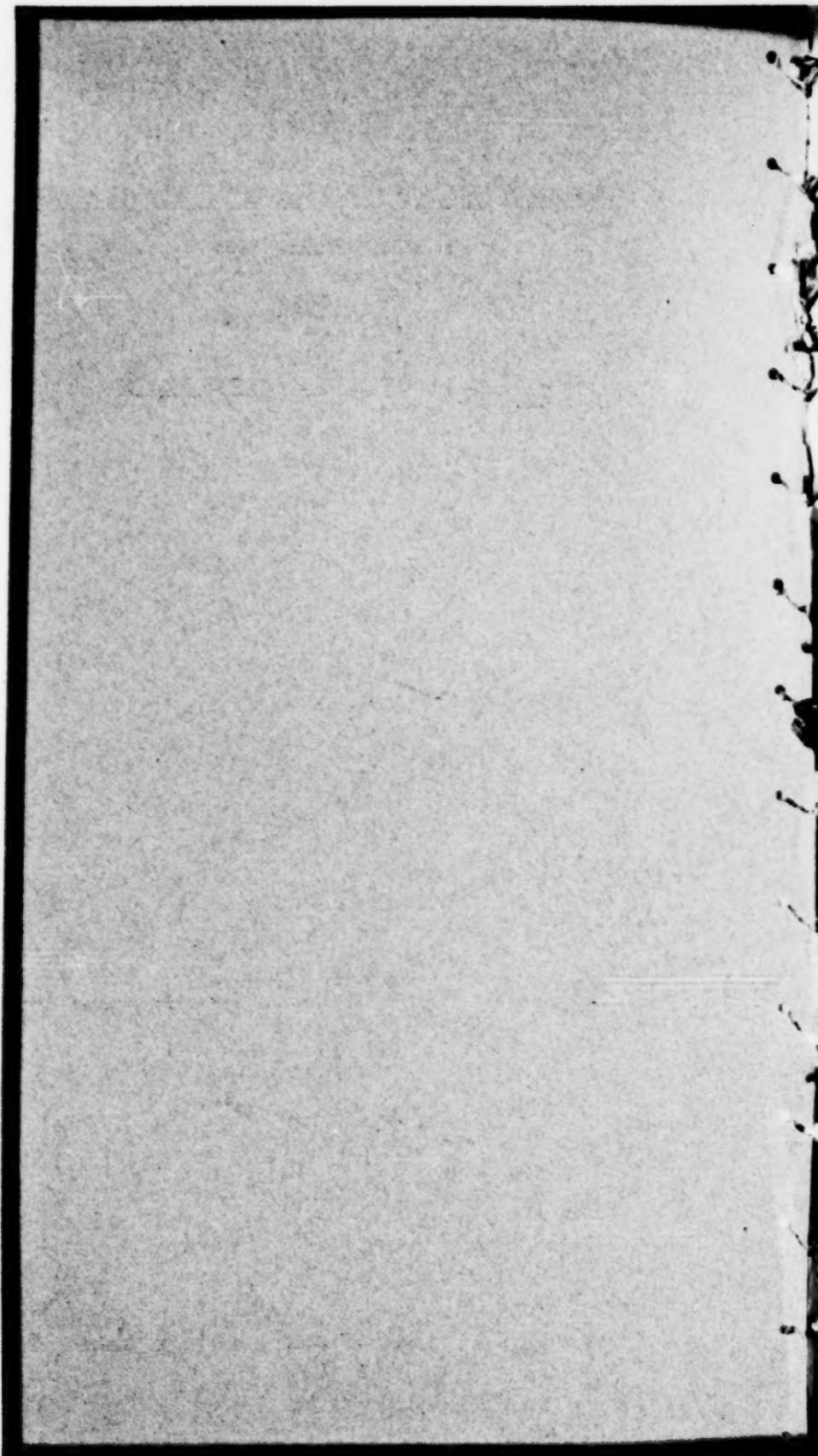
vs.

EASTERN TEXAS RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TEXAS.

FILED APRIL 13, 1921.

(28,227)



(28,227)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 870.

THE STATE OF TEXAS, APPELLANT,

vs.

EASTERN TEXAS RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TEXAS.

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1 Supreme Court of the United States.

— Term, 192—.

No. —.

THE STATE OF TEXAS, Appellant,

vs.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
Daniel Upthegrove, and E. J. Mantooth, Appellees.

Appeal from the District Court of the United States for the Western
District of Texas, Austin Division.

— — —, Counsel for Appellant.

— — —, Counsel for Appellees.

Caption.

Be it remembered, that at a regular term of the United States
District Court for the Western District of Texas, holding its session
at Austin, Texas, and which term began on January 24th, A. D.
1921, and continued to and including the 17th day of March, A. D.
1921, there came on to be heard and determined before the Honorable
Du Val West, United States District Judge, on March 17th,
A. D. 1921, cause No. 323, Equity, entitled The State of Texas vs.
Eastern Texas Railroad Company, et al., pending on the Equity
Docket of said Court, and the application of the defendants therein
to dissolve the injunction granted by the Honorable George Calhoun,
Judge of the District Court of the Fifty Third Judicial District of
Texas, at Austin, on the 9th day of July, A. D. 1920.

2 In the District Court of Travis County, Texas, for the Fifty-
third Judicial District.

No. —.

THE STATE OF TEXAS, Plaintiff,

versus

EASTERN TEXAS RAILROAD COMPANY et al., Defendants.

To the Honorable George Calhoun, Judge of Said Court:

Comes now the State of Texas, plaintiff, acting by and thru the
Attorney General of the State of Texas, and complaining of the
Eastern Texas Railroad Company, E. B. Perkins, F. W. Green,

Daniel Upthegrove, and E. J. Mantooth, defendants, for cause of action against the defendants, alleges to be true the following facts, viz:

1. Defendant Eastern Texas Railroad Company is a railroad corporation duly and legally incorporated and chartered under the laws of the State of Texas relating to the incorporation of common carriers by railroad for hire, and that E. J. Mantooth, who resides in the town of Lufkin, Angelina County, Texas, is the secretary of said railroad corporation and its agent upon whom service of process in this cause may be had. The defendant E. B. Perkins resides and has his domicile in the city of Dallas, Dallas County, Texas; the defendant Daniel Upthegrove resides and has his domicile in the city and county of St. Louis in the State of Missouri. The defendant E. J. Mantooth resides and has his domicile in the county of Angelina in the State of Texas, and the defendant F. W. Green resides and has his domicile in the county of — in the State of —.

2. By virtue of the terms of the general law enacted by the Twenty-first Legislature of the State of Texas and approved April 8, 1889, it was and is provided that no main track of any railroad once constructed and operated shall be abandoned or removed, and that said provision of said law has continuously remained in force and effect from its original enactment in the year 1889 to this date and is still in full force and effect.

3. On or about the 8th day of November, A. D. 1900, the promoters and organizers of what is now defendant, the Eastern Texas Railroad Company, filed in the office of the Secretary of State of the State of Texas the charter of said defendant Railroad Company, and that said defendant Railroad Company, acting under said charter and various amendments thereof, is and has continuously been since said date, to-wit, Nov. 8, 1900, a railroad corporation chartered, created and acting as such under and by virtue of its said charter and amendments thereof, and is in all things subject to the laws of the State of Texas. That attached to the petition, marked exhibit A and prayed to be taken apart hereof are certified copies of said charter of said defendant and of all amendments thereto.

4. That by the terms of said charter of said defendant Railroad Company, it applied to the State of Texas for authority and received from the State of Texas authority to construct a line of railway from the town of Lufkin in Angelina County, Texas, thru said county and the counties of Trinity and Houston to the town of Kennard in Houston County, Texas, a distance of 30.3 miles, and that having received said authority, said defendant railroad company did thereafter by virtue of such authority actually construct said line of railroad, together with the appropriate and incidental sidings, spur tracks, depot buildings, switches and other structures, and is now maintaining and operating said line of railroad as a going concern, and is now and has continuously been for many years last past actually operating and maintaining said line of railroad as a common

carrier of freight and passengers for hire, and is and during all of said series of years has continuously been engaged in transporting over said line of railroad passengers and freight from points of origin to points of destination, each of which are wholly situated within the State of Texas, and that said line of railroad is together with all of its operating facilities and accessories wholly situated within the territory of the State of Texas, and that it in fact constitutes and is an important instrumentality for transporting and delivering passengers and freight in purely intrastate business in the State of Texas.

5. That by applying for and procuring the issuance to it of said charter from the State of Texas, and by the said amendments thereto, and by accepting and exercising the powers and authorities conferred upon it under the terms of said charter and its amendments, the defendant the Eastern Texas Railroad Company agreed to and contracted and obligated itself with the State of Texas that it would maintain and operate said line of railroad in conformity with all of the requirements and provisions of law existing and governing the operation and maintenance of railroads at the date when said charter was obtained, and that said defendant railroad company particularly contracted and obligated itself to the State of Texas that it would not during the time for which said charter was granted abandon or remove any portion of the main track of its said railroad after same was constructed, and that the above quoted provision of the general law of the Twenty-first Legislature of the State of Texas with reference to abandonment and removal of main tracks of railroads entered into and became a part of the contract existing between the State of Texas and said defendant railroad Company, and that by virtue of the terms of said contract said defendant railroad company became bound and obligated unto the State of Texas to continuously maintain and operate all of its main line of railroad from the date when said main line was constructed and placed in operation until the expiration of the contract evidenced by said charter and amendments thereto and laws entering into and becoming a part thereof.

6. That by virtue of the above quoted statutory provision of the act of the Twenty-first Legislature of the State of Texas with reference to the abandonment and removal of main tracks of railroads, the State of Texas in the exercise of its inherent, reserved and sovereign police powers made it unlawful for any railroad company doing business in the State of Texas to abandon or remove any of its main lines of railroad, especially main lines of railroad employed as said main line of said defendant's railroad is employed for the purposes of purely intrastate commerce of the State of Texas, and that said main line of said defendant's railroad cannot be removed or abandoned by said defendant without the consent of the State of Texas except by violation of its valid laws duly enacted in pursuance of its sovereign powers to prescribe police regulations governing the transaction of an instrumentality of its purely local commerce.

7. That by the terms of an act of the Congress of the United States denominated an act "for the regulation of transportation" passed Feby. 28, 1920, it is, in substance, provided that any railroad company engaged in interstate commerce that wishes to obtain authority to abandon any portion of its railroad and to cease operating same may apply for such authority to the Interstate Commerce Commission, and that said commission may upon hearing of such application grant to such railroad company the right to abandon and discontinue the operation of such line of railroad, the granting of which application shall be evidenced by a certificate of said commission. Said act further provides in express terms that "from and after the issuance of such certificate * * * the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate, and proceed with the * * * abandonment covered thereby."

Plaintiff alleges on information and belief that said quoted provision of said Federal transportation act, in so far as it attempts to bestow or confer upon railroad companies engaged in intrastate commerce the right or authority to abandon their instrumentalities of interstate commerce without the consent of the States

in which such instrumentalities are exercised and in violation of the police regulations and contractual obligations existing between such carriers and such States, is unconstitutional and void because contrary to those constitutional provisions which prohibit the impairing of the obligations of contracts, and which reserve to the states all of their sovereign powers, except such as have been delegated by them to the Federal government, particularly their sovereign powers to regulate and preserve their instrumentalities of purely local commerce, and in this connection the State of Texas alleges that if said quoted provision of said transportation act is to be construed as attempting to confer on the interstate commerce commission power and authority to authorize the defendant the Eastern Texas Railroad Company to cease the operation of its said main line of railroad and to abandon same and to remove it, then said provision is unconstitutional, null and void because it constitutes an attempt by the Federal Congress to confer upon the Interstate Commerce Commission a power to exercise and prescribe police regulations in a matter which is reserved to and falls wholly within the jurisdiction and sovereignty of the State of Texas, and because it constitutes and is an attempt to confer authority upon the Interstate Commerce Commission to impair and destroy the obligations of said railroad company to the State of Texas and its people as fixed and evidenced by a valid and subsisting contract between the State of Texas and said defendant Railroad Company.

8. On or about the 3rd day of June, A. D. 1920, defendant the Eastern Texas Railroad Company filed with the Interstate Commerce Commission its certain written application for authority to abandon its said lines of railway situated in the counties of Trinity and Houston in the State of Texas, and for authority to take up and remove its

said tracks and for authority to sell and dispose of the salvage of said properties, and said defendant railroad company is proceeding to prosecute before the Interstate Commerce Commission its said application with a view to obtaining from said commission a certificate of the character attempted to be authorized by the terms of said act and described in paragraph 7 of this petition. The State of Texas alleges that said main track of said defendant railroad is a substantial and important instrumentality of purely intrastate commerce, having its points of origin and points of destination wholly within the State of Texas, and that if said defendant railroad company procures from the Interstate Commerce Commission said certificate which it is attempting to procure, it and the other defendants in this cause will in conformity with the purported authority attempted to be conferred by such certificate, immediately abandon the operation

of its said main track and will thereby immediately and irreparably damage the people of Texas who from day to day desire to use and do use said line of railroad as a common carrier for the transportation of passengers and freight in purely local as distinguished from interstate commerce. The plaintiff further alleges in this connection that said threatened and irreparable damage cannot be averted if the abandonment of said road is not enjoined and restrained prior to the action of the Interstate Commerce Commission on said application of said defendant railroad company, because said application will, if granted, purport to confer immediate authority on said defendant railroad company to at once abandon the operation of its said main line of railway, and that any abandonment thereof pending the action of this court on an application for injunction will, under the circumstances, work serious and irreparable damage to said travelling and shipping public. The State of Texas further alleges in this connection that it cannot safely submit itself to the jurisdiction of the Interstate Commerce Commission for the purpose of opposing the granting of said certificate to said defendant railroad company, because said transportation act attempts to prescribe a course of procedure for appealing from its decision which, if adopted by the State of Texas, would compel it to permit its citizens to suffer the irreparable damage above detailed pending the final disposition of such appeal, and would also compel it to invoke the jurisdiction of courts other than the courts of Texas for the protection of its sovereign rights. That a true copy of said application of said defendant railroad company to the Interstate Commerce Commission is attached to this petition, marked Exhibit B, and prayed to be taken as part hereof.

9. That the defendants herein, other than defendant the Eastern Texas Railroad Company, are each officers, agents, servants, employees and attorneys of said defendant railroad company, and are actively co-operating with it in its attempt to violate the laws of the State of Texas, and said contract with the State of Texas as above alleged, and are threatening to abandon and remove said main line of railroad tracks and cease the operation thereof.

10. The defendants herein, by the terms of their said application to the Interstate Commerce Commission, allege in substance that said line of said defendant railroad company cannot be operated except at a loss, and that such loss will continue from year to year in the future so long as said railroad is operated and maintained, and that the population along said line of railway is very sparse, and that there is no prospect of any increased commercial development in the territory tributary to said line of railway, and that the productive conditions in said territory are declining rather than improving. Said defendant railroad company further alleges in substance, as follows—that said line of railway is in bad physical condition and repair, and that it has no adequate rolling stock, and that said defendant cannot finance the operation of its said line of railroad and pay and defray its other fixed charges and expenses. The State of Texas alleges in this connection that it does not believe that said allegations of said application are true, but that it has not had opportunity to fully investigate or verify the truth or falsity of the allegations of said application. The State of Texas further alleges in this connection that if said allegations are true, and if said defendant railroad company cannot without financial loss presently operate said line of railroad, said facts do not afford any legal ground or justification for the violation of the valid laws of the State of Texas above set out or for the violation by said defendant of its said contract with the State of Texas, and that said defendant, because of said laws and because of its obligations under said contract with the State of Texas, and because of its paramount duty to the travelling and shipping public of Texas, is bound and obligated to maintain the operation of its said line of railroad even though such operation may temporarily result in financial loss to said defendant. The plaintiff further alleges in this connection that if it be true that said defendant railroad company cannot presently finance the operation of its said line of railroad for any of the reasons alleged by it in said application, and if temporary conditions be such that the operation of said railroad can only be continued at financial loss to said defendant, then this Honorable Court should, for the protection of the rights of the State of Texas and of the shipping and travelling public, appoint a receiver for said railroad properties with authority and power to take possession of and operate said railroad properties, and with further power and authority to raise funds for said purpose by issuance of receivers' certificates which should be made a first lien against said properties and all receipts resulting from the operation thereof.

Premises considered, plaintiff prays that this Honorable Court forthwith issue and direct to be served upon each of the defendants a temporary writ of injunction enjoining and restraining each of them, and each of their agents, servants and employees until the further order of this Court from abandoning said line of railroad or any part thereof, and from ceasing or discontinuing the operation of said line of railroad, or any part thereof, for the transportation of passengers and freight in intrastate commerce. Plaintiff further

prays that this Honorable Court set this cause down for hearing on the above application for appointment of a receiver of the properties of the Eastern Texas Railroad Company, and that after due notice to the defendants, said Court, if necessary for the protection of the public, appoint a receiver of said property with the powers and duties above mentioned. Plaintiff further prays that upon final hearing hereof said temporary restraining order be made perpetual, and for all such other and further relief, either general or special, legal or equitable, as it may be entitled to by virtue of the premises.

C. M. CURETON,

Attorney General of the State of Texas.

BRUCE W. BRYANT,

Assistant Attorney General of the State of Texas.

V. L. BROOKS,

Of Counsel.

THE STATE OF TEXAS,
County of Travis:

I, Bruce W. Bryant, hereby on oath state that I am Assistant Attorney General of the State of Texas, and as such authorized to verify the foregoing petition. I further on oath state that the facts alleged in said petition are true, except where alleged on information and belief, and that where so alleged, I am informed and verily believe same to be true.

BRUCE W. BRYANT.

Subscribed and sworn to before me, the undersigned authority, by C. M. Cureton this 9th day of July, A. D. 1920.

VANCE STOCKTON,

Notary Public in and for Travis County, Texas.

(Endorsed:) No. 37,715. The State of Texas, Plaintiff, vs. Eastern Texas Railroad Company et al., Defendants. In the District Court of Travis County, Texas, for the Fifty-third Judicial District, Plaintiff's Original Petition. Filed in the District Court, Travis Co., Texas, 53rd Judicial District, July 9th, 1920. S. A. Philquist, Clerk.

9 In the District Court of the United States in and for the
Western District of Texas.

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY, a Corporation, et al., Defendants.

Supplemental Bill of Complaint or Petition of the Plaintiff, The State of Texas.

C. M. Cureton, Attorney General; W. A. Keeling, E. F. Smith, Bruce W. Bryant, Tom L. Beauchamp, Assistant Attorneys-Generals, Solicitors for the Plaintiff, the State of Texas.

Filed January 15, 1921.

D. H. HART,
Clerk.

912 In the District Court of the United States in and for the
Western District of Texas.

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY, a Corporation, et al., Defendants.

Supplemental Bill of Complaint or Petition of the Plaintiff, the State of Texas.

Now comes the complainant, the State of Texas, and presents this, its supplemental bill in answer to the original answer and supplemental answer of the defendants heretofore filed herein, and in answer to the defendants' motion to dissolve temporary writ of injunction granted herein, and in aid of the plaintiff's original petition heretofore filed in this cause. For such supplemental bill, the plaintiff alleges:

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For purposes of brevity, the allegations in this supplemental bill made against the "defendant" are intended to apply to the defendant Eastern Texas Railroad Company; and to the other defendants in so far as they may have or may be aiding the said Eastern
10 Texas Railroad Company in the doing or the failure to do those things set forth in this supplemental bill.

II.

(a) Plaintiff alleges that on the 8th day of November, A. D. 1900, defendant filed its Articles of Association in the office of the Secretary of State of the State of Texas, and thereby and thereafter became a corporation. That the name of the defendant under its said Articles was and is "Eastern Texas Railroad Company." That it was chartered "for the purpose of constructing, owning, maintaining and operating" a railroad from the town of Lufkin, in Angelina County, State of Texas, to the City of Crockett, in Houston County, Texas.

It was declared that the corporation should begin to exist on the 1st day of November, 1900, and continue as a corporation for a period of 25 years therefrom. The amount — defendant's capital stock as stated in its charter was \$150,000. The names and places of residence of the several persons forming the corporation were:

R. H. Keith, Kansas City, Missouri.
W. C. Perry, Kansas City, Missouri.
John Perry, Kansas City, Missouri.
J. C. Sherwood, Kansas City, Missouri.
Charles Campbell, Kansas City, Missouri.
D. A. Nunn, Crockett, Texas.
D. A. Nunn, Jr., Crockett, Texas.
John Morrison, Texarkana, Texas.
W. H. Carson, Texarkana, Texas.
W. H. Welch, Texarkana, Texas.

The names of its first Board of Directors were:

W. H. Carson, Texarkana, Texas.
W. H. Welch, Texarkana, Texas.
11 D. A. Nunn, Crockett, Texas.
D. A. Nunn, Jr., Crockett, Texas.
R. H. Keith, Kansas City, Missouri.
W. C. Perry, Kansas City, Missouri.
J. C. Sherwood, Kansas City, Missouri.

The government of defendant in the management of its affairs was vested by its charter in the Board of Directors, President, Vice-president, Secretary and Treasurer, and a Superintendent or Manager. The capital stock of defendant was divided into 1,500 shares of the par value of \$100 each.

Afterwards on the 20th day of February, 1901, the defendant filed an amendment to its charter, naming the counties through which its proposed line should run. Afterwards, on or about the 26th day of August, 1902, the defendant amended its charter by increasing its capital stock from \$150,000, to \$1,000,000. Thereafter, on or about the 28th day of November, 1910, defendant again amended its charter and changed its general offices from the town of Kennard, to the City of Lufkin, in Angelina County. Defendant, by the act

of becoming a corporation under the Constitution and laws of Texas, and by the several amendments thereof to its charter, became a corporation chartered under the Constitution and laws of Texas, with the rights and privileges granted railroad corporations by the Constitution and laws of this State, and became charged with all the burdens and liabilities imposed by such Constitution and laws. That the charter of defendant and the several amendments thereof constitute an agreement and contract between the defendant and the

State of Texas for a period of 25 years from the 8th day of
12 November, 1900.

That the defendant did operate and maintain its line of railroad as constructed under the privileges and franchises received by it, in accordance with its said charter, and the Constitution and laws of the State of Texas, that it became bound and obligated to obey all Constitutional Statutes of the State of Texas and all lawful orders of the Railroad Commission of the State of Texas; that each and all of the statutes of this State of which it complains entered into and became a part of such charter contract and were then, and have since remained, and are now binding upon defendant.

That among other obligations which the defendant accepted when it became a corporation was that complained of by it, but nevertheless imposed by the statutes of this State, that it would not abandon, take up and remove its main line of railway without the consent of the Legislature of the State of Texas, which it has not obtained; that it would likewise continue to operate its trains as provided for by the laws of Texas and obey the lawful orders of the Railroad Commission of the State of Texas; that by virtue of its said charter contract with the State of Texas, it obtained the right to be a railroad corporation and common carrier of passengers and freight for hire, with the right to charge fares, freights and tolls for its services; and to be protected in the exercise of these franchises and rights by

the Constitution and laws of this State. That the defendant
13 by reason of its charter obtained the extraordinary right, privilege and franchise of eminent domain which it either did or could have exercised and which it may yet exercise should it find it necessary in carrying out its purposes as a chartered railway corporation under the Constitution and laws of this State. That the defendant, after having obtained its charter, proceeded to exercise the rights, privileges and franchises thereby granted it by the State of Texas and did construct its railroad and for a period of approximately 20 years has operated as a common carrier of freight and passengers for hire, and has collected large sums of money as a common carrier under and by virtue of the franchises, privileges and rights granted it by the Constitution and laws of **Texas**.

That among other privileges and rights acquired by defendant by virtue of its charter was that of receiving donations of right-of-way upon which its line of railway should be constructed; that defendant did receive large and valuable donations of right-of-way through Trinity and Houston Counties, the same being donated by the citizens of these respective counties.

That by virtue of its said charter and franchises and privileges incident thereto, defendant obtained the privilege of serving a large territory with a large population and receiving tolls and charges incident to its business from this territory; that there were and are a number of cities, towns and villages of 200 population or 14 more within 20 miles of defendant's line, among which may be named Apple Springs, in Trinity County; Diboll, in Angelina County; Alto, in Cherokee County; Crockett, in Houston County; and Wells, in Cherokee County; that the towns on defendant's line are Lufkin, in Angelina County, population 5,000; Chancey, in Angelina County, population of less than 100; Ratcliff, in Houston County, population of 900; Kennard, in Houston County, population of 1,200; that defendant was and is the only railroad at any of the four last named towns, except at Lufkin, but that at Lufkin there are five other railroads, to-wit:

The St. Louis Southwestern Railway Company; Angelina & Neches River Railroad; Groveton, Lufkin & Northern Railway, Texas Southeastern Railroad, and Houston East and West Texas Railway.

That, however, the defendant enjoyed the right of interchange of traffic with these last named railroads, guaranteed to it by the laws of Texas under its charter and franchise.

(b) That on or about August 28, 1906, defendant sold its net current assets amounting to \$24,604.49 and its rolling stock having a book value of \$70,000, to the Louisiana and Texas Lumber Company; that on September 1st, 1906, the St. Louis Southwestern Railway Company, a Missouri corporation, acquired the entire capital stock of defendant, and still owns the entire stock of plaintiff, except qualifying shares owned by its board of directors; that

15 since defendant's capital stock was so acquired by the said Missouri corporation, the defendant has ceased to have or exercise any will or purpose or management of its own, but all its activities as a common carrier have been merged with and become a part of the system of railways controlled by the St. Louis Southwestern Railway Company, a Missouri corporation, either directly or indirectly, through a subsidiary of the last named company, to-wit: the St. Louis Southwestern Railway Company of Texas. J. M. Herbert is president of and a member of the board of directors of the St. Louis Southwestern Railway Company (of Missouri), of the St. Louis Southwestern Railway Company of Texas and of defendant. F. W. Green is vice-president and director of the St. Louis Southwestern Railway Company (of Missouri), and is also vice-president of the St. Louis Southwestern Railway Company of Texas, and of defendant. That G. K. Warren is Treasurer of the St. Louis Southwestern Railway Company (of Missouri), and Assistant Secretary and Treasurer of the St. Louis Southwestern Railway Company of Texas, and of defendant. That D. C. Dobbins is Superintendent of the St. Louis Southwestern Railway Company of Texas, and of defendant; and the auditing department of Eastern Texas Railway Company is done under arrangement by the auditing department

16 of the St. Louis Southwestern Railway Company of Texas; that in routing passengers and shipping freight over the two
17 Texas lines of the Missouri corporation, to-wit, the St. Louis Southwestern Railway Company of Texas and defendant, the rates, charges and fares, methods and management of transferring, treat the same as one and the same line; that to all practical intents and purposes, the Eastern Texas Railroad has been consolidated with
18 and constitutes a part of the St. Louis Southwestern Railway Company of Texas, which in turn is a part of the system owned and controlled by the St. Louis Southwestern Railway Company (of Missouri); that the St. Louis Southwestern Railway Company of Texas owns, controls and operates approximately 810.50 miles of railroad in Texas, including the mileage of defendant; that the St. Louis Southwestern Railway Company (of Missouri) owns, controls and operates approximately 1,753.83 miles of railway in the United States, including the 810.50 miles of railroad in Texas just referred to; that the mileage of defendant constitutes only an insignificant portion of the total mileage of the St. Louis, Southwestern Railway Company of Texas, and a still smaller proportion of the total Southwestern Railway Company (of Missouri), and the revenues or losses derived from the operation of defendant constitute only an insignificant portion of the revenues or losses derived from or incurred by the St. Louis Southwestern Railway Company of Texas, or the system of railroads known as the St. Louis Southwestern Railway Company (of Missouri).

That during the period of the defendant's existence and down to and including the year 1917, the defendant was able to earn and receive, and did receive, a substantial corporate income in excess of its expenses, and that had such not corporate income been properly applied or expended, or any substantial amount thereof been
18 properly applied or expended in the upkeep of its line of road, said line of road would not require the unusual and extraordinary expenditures alleged and claimed to be necessary by the defendant in its bill.

Plaintiff alleges that since the acquisition of the stock of defendant by the St. Louis Southwestern Railway Company up to and about August 4, 1920, the defendant had only expended on additions and betterments of its line the approximate sum of \$3,793.40, and had expended in equipment the approximate sum of \$2,186.76, making a total expenditure for additions, betterments, equipments, of approximately \$5,980.16.

That if defendant has suffered any extraordinary decrease in its revenues since 1917 such decrease was due, as this plaintiff believes and alleges, to its management under Federal control, and to conditions brought about by the war, and to the fact that since the close of the war the country has been going through a period of reconstruction; that within a reasonable time and with the restoration of normal conditions, its revenues will, by the exercise of proper diligence on the part of defendant, again be sufficient to meet all its proper and necessary expenses; plaintiff further alleges that if defendant has suffered any extraordinary increase in its expenses, then such increase

was due to the war and conditions prevailing during the period of reconstruction; that with the return of normal conditions its expenses can be and will be materially reduced.

19. That the mere fact that defendant is not now operating at a profit, if in fact it is not so operating, which is not admitted, is not sufficient reason in law, either under the Fourteenth Amendment to the Constitution of the United States or under the Transportation Act of 1920, for permitting the defendant to abandon its railroad and remove the same, or to permit it to discontinue obedience to the laws of Texas requiring the operation of its trains under proper circumstances.

In this connection, plaintiff alleges that defendant has no bonded indebtedness of any kind or character, and is amply able to obtain sufficient funds from its own resources to carry forward its business as a common carrier; that by reason of its ownership by the St. Louis Southwestern Railway Company (of Missouri) and its consolidation with the St. Louis Southwestern Railway Company of Texas, the defendant can obtain sufficient funds to carry it over the present crisis in its financial affairs, if any such crisis exists which is not admitted.

That notwithstanding the fact that the stock of defendant has become the property of the St. Louis Southwestern Railway Company (of Missouri), and, notwithstanding the fact that it has become consolidated with the St. Louis Southwestern Railway Company of Texas, and has become a part of the system of railroads owned and controlled by the St. Louis Southwestern Railway Company (of Missouri), still all the charter obligations and all statutory

20. obligations resting upon the defendant in the first instance are lasting and binding obligations on it, and, as to its operation, upon the lines with which it has been consolidated.

III.

Plaintiff alleges that the State of Texas is sovereign State of the Union, having been admitted into the United States on an equal footing with all the other States in all respects whatsoever, in 1845; that as such State it is within all the protective clauses of the Constitution of the United States, and has reserved to it all legislative, executive and judicial powers which were respectively reserved to the States at the time of the formation of the government of the United States and the adoption of its Constitution.

That among other rights so reserved to the several States of the Union and to the State of Texas, was that permitting them to create and control private corporations and particularly private corporations engaged in the business of common carriers; the property of which lies wholly within the State creating the corporations. That the government of the United States and the Congress, which is its agency for legislative matters, and the Interstate Commerce Commission, a legislative and administrative agency created by the Congress of the United States, have no judicial authority authorizing

them to determine any justiciable question where the political, property or contract rights of the State are involved; that justiciable controversies between the State of Texas and a sovereign state or the United States can only be determined under the Constitution of the United States, particularly under Article III, Section 2, and the Eleventh Amendment to the Constitution of the United States, in the Supreme Court of the United States; and can not be determined before any other court nor before any legislative body or before Congress, nor before any legislative or administrative board or commission, nor before the Interstate Commerce Commission of the United States; that no citizen of the State of Texas and no citizen of any other State and no corporation of any kind or character can bring an action against the State of Texas, or against those lawfully acting for it as public officers, in any court, nor before the Interstate Commerce Commission of the United States, without the consent of the State of Texas; and that such consent has not been granted by the State of Texas for the defendant to sue it before the Interstate Commerce Commission of the United States.

That notwithstanding the aforesaid allegations of law and fact, the Congress of the United States did, by an Act approved February 28, 1920, generally known as the Transportation Act of 1920, pass an act, which in part reads as follows:

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the government of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some news-

paper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: Provided, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraph (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

25 That the substance and effect of these paragraphs of the Transportation Act is to authorize a carrier to bring an action before the Interstate Commerce Commission against the State and all other interested parties, for the purpose of obtaining a decree authorizing the complaining carrier to abandon all or any portion of its line of railroad, or the operation thereof; that said Act in effect provides for the service of a sub-pena or notice on the public and on the State involved by delivery of a copy thereof to the Governor of the State with the right of such state to be heard; that said Act purports to give the Interstate Commerce Commission the right to hear such application and the pleadings and evidence of the parties, including that of the State, and to issue a decree granting to the complaining carrier the right to abandon all or any portion of its lines or railroad or the operation thereof. That said Act purports to confer authority upon the said Interstate Commerce Commission to grant such certificate of abandonment and the Railroad Company to carry into effect the terms of the same without securing the approval of the State or any of its agencies or authorities. That the legal effect of said Statute is to authorize the Interstate Commerce Commission to adjudicate.

(a) That such complaining railroad has complied completely as to time and effect with its charter contract with the State which chartered same;

(b) Or that the State has violated the terms of its charter 26 contract in such manner and form and under such circumstances as would authorize the carrier to no longer abide by and within the same;

(c) or that the financial condition of the road is such and all the facts and circumstances which surround it are such that it can not in law be required to comply with its charter contract with the State and the laws and regulations governing its operation;

(d) or that to further comply with its charter contract with the state and abide by the laws made for its regulation, would be to take the property of such carrier without due process of law;

(e) or that for the carrier to longer comply with such charter contract and the laws governing its existence and operation would be confiscatory and unreasonable;

(f) or that for the carrier to longer abide by its charter contract and the laws of the state governing its existence constitutes a burden on interstate commerce;

(g) or that other facts exist which authorize the corporation to abandon and take up its line of railroad or to abandon the operation of the same.

That each and all of the issues hereinabove suggested and which may be determined by the Interstate Commerce Commission and all such issues which it is contemplated may be determined by the In-

terstate Commerce Commission, whether here enumerated or not, are each and all judiciable issues between plaintiff and defendant in this case, or present questions for determination by the legislative department of the State.

27 Plaintiff alleges in this connection that the State of Texas has a complete system of laws for chartering, regulating and controlling railroads, beginning with its Constitution adopted in 1876, and continuing down to and including the various statutory enactments under the Constitution, including the creation of its State Railroad Commission for the purpose of controlling railroad corporations and administering the laws relative to them, down to the present time.

That the various statutes are too numerous to mention in this pleading, but are a part of the law of the land known judicially by this court. That the defendant obtained its charter, its right to be a corporation and all the franchises, rights, profits and emoluments incident thereto from the State of Texas, upon condition that it should accept as the law governing it the Constitution of the State of Texas and all the Constitutional statutes of Texas, and that it would abide by the —. Particularly was the defendant bound and obligated not to take up and remove its main line track without the consent of the Legislature of the State of Texas, and particularly was it bound and obligated to operate its line of railroad as a common carrier under the laws of the State of Texas, and the lawful orders of the Railroad Commission of Texas made for such purpose. That notwithstanding all the aforesaid, plaintiff alleges that on or about the 3rd day June, 1920, the defendant brought an action by filing an application or petition with the Interstate Commerce

Commission at Washington against the State of Texas and 28 against the public in the manner and form contemplated by the aforesaid unconstitutional Act of Congress, for the purpose of having annulled by the said Interstate Commerce Commission its charter contract and all its obligations to the State of Texas and to the public so far as continuing its line of railway and the operation of its line was concerned, and for the purpose of securing the right to abandon its entire line of railway and the operation thereof; that there was then published a notice of such application on the part of plaintiff, as is required by this unconstitutional act, and the State of Texas summoned and cited in effect to appear before the Interstate Commerce Commission as a protestant or defendants by delivery to the Governor of the State a copy of such notice issued under the pretended authority of the Interstate Commerce Commission.

That the said Interstate Commerce Commission, assuming that said unconstitutional Act of Congress was law, proceeded to have testimony taken and a hearing on the subject matter of said complaint, but plaintiff did not appear or participate in said hearing or unlawful proceeding. That notwithstanding these facts, and notwithstanding the unconstitutional and void character of this pretended law, and notwithstanding that the State of Texas is protected

by the Eleventh Amendment to the Constitution and by the Fourteenth Amendment to the Constitution, which protects the contract alleged of the State of Texas with the defendant, still, nevertheless the Interstate Commerce Commission did, on the 2nd day of December, A. D. 1920, enter a judgment and decree which it

29 denominates a "Certificate of Public Convenience and Necessity" in favor of the defendant, in which decree the said Interstate Commerce Commission found, in legal effect, that the State of Texas had been duly cited or subpoenaed, in that the said Commission in said certificate recited that "upon receipt of such application the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas"; that said Commission found and concluded in law that it had given "due notice to all parties in interest," and that it had given a hearing upon the application of the defendant "at which all parties in interest were given an opportunity to appear and be heard in the premises."

That in said decree or certificate referred to, the said Interstate Commerce Commission certifies that the present public convenience and necessity permit of the abandonment of all the lines of railroad of the Eastern Texas Railway Company, and it declares in said decree that, "it is therefore ordered that the Eastern Texas Railroad Company be and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated."

IV.

Plaintiff alleges that the Certificate of Public Convenience and Necessity ordered and decreed by the Interstate Commerce Commission and upon which the defendant relies was: (a) beyond the power

which it could constitutionally exercise; (b) beyond its statutory powers; (c) confiscatory of the contract rights of the

State of Texas embraced within the charter of the defendant and the several statutes and the Constitution of the State of Texas which constituted a part of the same, and in violation of the 14th Amendment to the Constitution of the United States prohibiting the taking of property without due process of law; (d) that the granting of such Certificate was without evidence or without sufficient evidence in law to support the same, and was arbitrary and unjust; that the Commission in granting the same exercised its authority in such an unreasonable manner that the granting of the same was and is void; (e) that the granting of such Certificate was against the evidence before the Commission, and was and is contrary to the actual findings of fact made by the Commission itself, although said findings of fact themselves are more restrictive and more favorable to the defendant than the evidence itself warranted; that for all of said reasons, as well as all others alleged in this answer, the said Certificate of Public Convenience and Necessity is null and void.

V.

Plaintiff alleges that if it be found in truth and in fact that defendant is not able to operate the trains on its line of railway and to rehabilitate the same or if temporary conditions be such that defendant can only operate its railroad at a financial loss, then that for the protection of the rights of the State of Texas and the shipping and travelling public, this Court should appoint a receiver of said railroad properties as is provided by the laws of Texas or as may be provided by the laws of the United States, if any applicable thereto, with authority and power to take possession of and operate said railroad properties and with further power and authority to raise funds for said purpose by the issuance of receiver's certificates which should be made a first lien against defendants' said property and all receipts resulting from the operation thereof.

VI.

The plaintiff further alleges that to dissolve the temporary injunction heretofore granted in this cause and to permit the plaintiff, the Eastern Texas Railroad Company, to discontinue the operation of its trains, abandon its road and remove its track during the pendency of this suit and before its final determination, would be to permit the destruction of the subject matter of the suit and that the final prosecution of this suit to a successful issue by the plaintiff would be vain and useless. That the only way to preserve the status quo so that the defendant, the Eastern Texas Railroad Company, would be able to respond to a judgment in favor of the plaintiff, is to maintain the status quo by a continuance of the temporary injunction heretofore granted. That the legal questions involved are *ones* of first impression arising over a very far reaching Act of Congress and one which vitally affects the control of plaintiff over the various railroad systems within this State and acting under charters obtained under the laws of Texas that and this court ought not to permit the distinction of the subject matter of this suit by authorizing the discontinuance of the operation of defendants' trains and the abandonment and the destruction of its railway until its constitutional right to do so has been determined by the Court's last resort having jurisdiction over the questions presented by plaintiff's bill and this supplemental bill.

VII.

The defendants have been cited in this cause and having appeared and answered the plaintiff reiterates its prayer contained in its original petition; it further prays that the motion to dissolve the temporary injunction heretofore granted be denied; and if necessary in accordance with plaintiff's allegations in its original petition and this supplemental bill that a receiver be appointed to operate said property; and upon a final hearing that the temporary injunction herein

be made perpetual and for all such further relief, either general or special, legal or equitable as plaintiff may be entitled to.

(Sgd.)

C. M. CURETON,

Attorney General;

W. A. KEELING,

E. F. SMITH,

TOM L. BEAUCHAMP,

BRUCE W. BRYANT,

Assistant Attorney-General of the State of Texas,

Solicitors for the Plaintiff.

33 THE STATE OF TEXAS,
County of Travis;

I, Bruce W. Bryant, hereby on oath state that I am Assistant Attorney General for the State of Texas and as such authorized to verify the foregoing supplemental petition. That the allegations made in the foregoing are made upon information and belief; that affiant believes the facts alleged to be true and upon such information and such belief alleges that the same are true.

(Signed)

BRUCE W. BRYANT.

Subscribed and sworn to before me the undersigned authority, on this the fourteenth day of January, A. D., 1921.

(Signed)

VANCE STOCKTON,

[SEAL.]

*Notary Public in and for
Travis County, Texas.*

34 In the District Court of the United States in and for
the Western District of Texas.

In Equity.

No. 323.

THE STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD COMPANY, INCORPORATED, a Corporation,
et al., Defendants.

Answer of Defendants.

Now come the Eastern Texas Railroad Company, Incorporated, a corporation, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Manton, defendants in the above entitled action, and for answer to the petition and complaint of plaintiff herein, file the following:

1.

Defendants admit the allegations contained in Paragraph 1 of Plaintiff's Bill of Complaint, as alleged.

2.

Defendants specially deny the allegations contained in Paragraph 2 of Plaintiff's Bill of Complaint, and explaining the facts upon which plaintiff relies, defendants allege and plead that at the time the General Law enacted by the Twenty-first Legislature of the State of Texas, and approved April 8, 1889, referred to in said paragraph of said Bill of Complaint, was passed and approved, the Congress of the United States had not passed or adopted any law or laws particularly and definitely providing the method whereby a railway company, being a carrier engaged in interstate commerce, might abandon the operation of its line of railway, or any portion thereof, or the operation of trains and the carrying of freight and passengers thereon, and it is evident that the Legislature of the State of Texas and the State Government believed that they had the authority and power to pass the said Act approved April 8, 1889, the existence of

which power defendants deny; and defendants further allege
35 that if the provisions of said Act, in which it is provided that

no main track of any railroad once constructed and operated may be abandoned or removed, was ever valid and enforceable, then defendants say that such provision has not continuously remained in force and effect from its original enactment, in the year 1889, to the date of the filing of plaintiff's Bill of Complaint, because the Congress of the United States did pass the Act known as the "Transportation Act of 1920," which was approved February 28, 1920, whereby the said Act of the Legislature of the State of Texas, passed by the Twenty-first Legislature and approved April 8, 1889, was modified, superseded, repealed and ceased to have any force and effect, for the reasons that subdivisions (18) to (22) of Section 402 of said Transportation Act, conferred jurisdiction and power upon the Interstate Commerce Commission to authorize any carrier subject to the provisions of said Act to abandon its line of railway, or any portion thereof, and to abandon the operation thereof after application and hearing, and to issue a certificate that the present or future public convenience and necessity permit of such abandonment, and to attach to the issuance of such certificate such terms and conditions as in its judgment the public convenience and necessity may require; and said Act provides that after the issuance of such certificate any carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in and attached to the issuance of such certificate, and proceed with the abandonment covered thereby. That the defendant, the Eastern Texas Railroad Company is a carrier by railroad, subject to the provisions of said Transportation Act, and defendants aver that said Transportation Act and the provisions thereof with reference to the

abandonment of the operation of the line, or any portion of the line
of a carrier by railroad is constitutional and authorized by the
36 provisions of the Constitution of the United States, and that
Defendant Eastern Texas Railroad Company has made ap-
plication to the Interstate Commerce Commission to issue a certificate
authorizing the abandonment of its entire line of railway and the
operation thereof, as provided in said Act, all of which is hereinafter
more fully explained and set forth.

3.

These defendants admit the allegations contained in Paragraph 3
of Plaintiff's Bill of Complaint, except that part which alleges that
defendant Eastern Texas Railroad Company since filing its charter
is in all things subject to the laws of the State of Texas, which allegation
it denies and with reference thereto refers to and pleads the
provisions of the Transportation Act of 1920, as referred to in
paragraph 2 hereof.

4.

Defendants admit the allegations contained in Paragraph 4 of the
Bill of Complaint, except that portion thereof which alleges that the
Eastern Texas Railroad Company's lines "constitute and is an im-
portant instrumentality for transporting and delivering passengers
and freight in purely intrastate business in the State of Texas,"
which it denies, and in reference thereto alleges that said Railway
Company is engaged in transporting and delivering passengers and
freight both intrastate and interstate business, and that such trans-
portation is intermingled and carried together on practically every
train operated by said railway company.

5.

Defendants specially deny the allegations contained in paragraph
5 of Plaintiff's Bill of Complaint, and with reference thereto allege
that by accepting and exercising the power and authority conferred
upon it under its Charter, that the Eastern Texas Railroad Company
37 did not obligate itself, or contract with the State of Texas to
maintain and operate said line of railway during the period
of time for which said charter was granted, or that it would
not remove said track, or any portion thereof, during said time, and
that it did not and could not contract or agree with said State to
waive, abandon or refuse to comply with or fail to comply with
when it was necessary, any provision of the Constitution of the
United States, or the laws passed in accordance therewith, and that it
did not contract or agree to operate said line of railway when the
operation thereof would not pay operating expenses or when it was
unable to procure funds with which to operate the same, or when the
necessity for such operation ceased, and it here pleads and relies
upon the provisions of said Transportation Act of 1920 referred to
and plead in paragraph 2 hereof.

6.

These defendants specially deny the allegations contained in the Sixth paragraph of the Bill of Complaint, and in reference thereto allege that the Act of the Twenty-First Legislature of the State of Texas therein referred to is not an exercise of police power, but is an exercise of power affecting property rights, and that the same is subject to the powers conferred upon Congress by the Constitution of the United States and the power exercised by Congress in the passage of the Transportation Act of 1920 and the special provisions thereof referred to and plead in Paragraph 2 hereof to which reference is here again made.

7.

These defendants specially deny the allegations contained in the seventh paragraph of the Bill of Complaint, and in reference thereto plead, allege and aver that by virtue of the provisions contained in Section 8 of Article 1 of the Constitution of the United States,

wherein it is provided that Congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian Tribes," and "to establish post offices, and post roads" and "make all laws which will be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any Department or officer thereof," and by virtue of the other powers conferred upon the United States by said Constitution, the Congress of the United States was authorized and empowered to pass the Act known as the Transportation Act of 1920 with the provisions therein contained, and especially the provision contained in Subdivisions (18) to (22) added to Section 1 of the Act to Regulate Commerce, hereinbefore referred to:

Defendants allege that the line of railway of the Eastern Texas Railroad Company is an instrumentality of Commerce, and that the power to regulate commerce includes and embraces the power to regulate all instrumentalities used in commerce; and defendants further allege that the Eastern Texas Railroad Company was and is engaged in interstate commerce at the time of the passage of said Act, was chartered for the purpose of engaging in interstate Commerce, and is an instrumentality of interstate commerce, and has been since its organization, and that the power to regulate, control and authorize the abandonment provided for in said Transportation Act was by the Constitution of the United States vested in Congress, and was properly exercised by Congress in the provisions contained in the Transportation Act of 1920; that the same are valid and binding upon the State of Texas and the citizens of the State of Texas and the United States.

8.

Defendants admit the allegations contained in Paragraph 8 of the Bill of Complaint, wherein it is alleged that the Eastern Texas Rail-

39 road Company has filed with the Interstate Commerce Commission a certain written application for authority to abandon the operation of its lines of railway, and for authority to take up and remove its properties, and that said Company is proceeding to prosecute before the said Commission its said Application with a view of obtaining from said Commission a certificate, as provided for in said Transportation Act of 1920, and wherein it is alleged that said defendant Railway Company, if it procures said certificate, will, in conformity with the authority conferred thereby, abandon the operation of said line of railway, and will remove and dispose of its property constituting said line of railway; but defendants deny all and singular the other allegations in said paragraph contained, and in reference thereto plead and allege that said line of railway is not a substantial or important instrumentality of intrastate commerce, and that the abandonment of the operation of said line, or the removal of said tracks will not immediately and irreparably damage the people of Texas in any manner or form, but on the contrary these defendants say that said line of railway has ceased to be a necessary instrumentality in the transportation of commerce, either intrastate or interstate.

Defendants further allege that said line of railway was originally constructed for the real purpose and object of transporting manufactured products from a large saw mill and manufacturing plant established near Kennard on said line of railway, which saw mill and plant depended for its operation upon timber and logs that it could procure in the territory adjacent and contributory to said mill and plant, and that said timber has been cut out and manufactured and the products thereof shipped out, and said mill has been dismantled and removed, thereby depriving said railway company of all the freight and traffic to and from said mill and to and from the employes thereof; that since the occurrences aforesaid, the cutting out of said timber and the dismantling of said mill and plant, there is not sufficient traffic transported by said line of railway to 40 pay its operating expenses or its maintenance or the necessary upkeep thereof, and that the defendant, the Eastern Texas Railroad Company has no method of procuring the necessary funds to conduct such operation, and that it is impossible for it to do so, all of which more fully appears from the statements and allegations contained in the Application which the said Railway Company has filed with the Interstate Commerce Commission, a copy of which is herewith filed, marked "Exhibit A" and made a part hereof, and the matters therein set forth are here adopted and plead as a part of this Answer as completely as if herein contained.

Defendants specially deny the allegations contained in paragraph 9 of the plaintiff's bill of complaint, except the allegation that the defendants, other than the Eastern Texas Railroad Company, are each officials, employes and attorneys of said defendant railway company; and in reference to said paragraph 9, these defendants allege

that the defendant F. W. Green is vice-president of said Railroad Company and defendant E. J. Mantooth is General Attorney of said Railroad Company, and the defendants E. B. Perkins and Daniel Upthegrove are attorneys associated with said Mantooth and representing said railroad company as attorneys in making said Application to said Interstate Commerce Commission for the issuance of a certificate for said railway company, under the provisions of said Transportation Act of 1920; that the action of the personal defendants therein were in the capacity described and was not by way of cooperation in any attempt to violate the laws of the State of Texas, and was not and did not and does not constitute a threat to abandon and remove said main line of railway, track and property or cease the operation thereof, and defendants allege that the allegations contained in said paragraph 9, and none of the other allegations contained in said bill of complaint authorize the making of said Green, Mantooth, Perkins and Upthegrove defendants therein, and
41 that, therefore, there is a misjoinder of parties and said personal defendants should be dismissed from this cause.

10.

Defendants admit the allegations contained in Paragraph 10 of the Bill of Complaint as to the terms of the Application of the Eastern Texas Railroad Company to the Interstate Commerce Commission, but say that such allegations are not full and complete and do not adequately present the allegations contained in such application, and for a fuller statement thereof, here refer to Exhibit A which has theretofore been made a part of this Answer, for a correct statement of such allegations, and make the allegations contained in said Exhibit A a part hereof; but defendants deny all the other allegations in said paragraph 10 contained, except the allegations in reference to the necessity for the appointment of a receiver, and as to the allegations denied and the allegations with regard to the necessity for a receiver, by way of explanation defendants plead and aver; that the laws of Texas do not require a railroad company to operate its railroad where the public necessity therefor no longer requires such operation, and do not require a railroad company to operate its road at a financial loss where the receipts from such operation are insufficient to pay operating expenses, including maintenance and necessary betterments, and where there is no present prospect of reasonable increase in such receipts. Defendants further allege that the Eastern Texas Railroad Company has never entered into any contract, express or implied, with the State of Texas or with the traveling and shipping public of said state, and had never bound or obligated itself to maintain the operation of its line of railroad, where such operation would result in financial loss, and say that if any obligation as claimed by plaintiff ever existed, which defendants deny, that the consideration therefor has wholly failed,
42 by reason of the fact that the traveling and shipping public do not and have not furnished since the dismantling of the

saw mill and plant on the Eastern Texas Railroad lines a sufficient amount of traffic to pay the operating expenses and proper maintenance of said railroad, and there is no present or future prospect of such an amount of traffic being furnished.

As to whether or not a necessity exists for the appointment of a receiver by this Honorable Court, as set forth in said Paragraph 10, defendants say that said railway lines are now being operated under the compulsion of a temporary writ of injunction issued herein. As to how long this compulsory proceeding could or should be complied with, defendants are at present without knowledge, but will investigate and when sufficiently advised, will inform this court.

11.

Further answering, defendants allege that the Application to the Interstate Commerce Commission, copy of which is herewith filed, marked Exhibit A, was duly presented to said Commission, and notice thereof given in accordance with law, and a full and complete hearing had thereon, as required by law and the orders of said Commission, and said Commission took the same under advisement, but has made no order thereon and delivered no opinion therein up to the date of the filing of this Answer; and defendants show to the court that they confidently expect such order and opinion to be delivered prior to the Hearing hereof, and when the same is made, if made, these defendants will ask permission of this court to present the same to the court for its consideration.

12.

Further answering, defendants say that the defendant Eastern Texas Railroad Company has at all times, to the best of its ability, complied with the laws, state and federal, governing the maintenance and operation of railroads, and has made every effort to economically operate and administer the properties of said company, that notwithstanding said facts said defendant railroad company had been unable to earn sufficient revenue from the operation of its lines of railway to pay operating expenses, including proper maintenance and betterments and the payment of taxes; that the operation of said lines is now being continued and performed at a loss, whereby a deficit is continually resulting and increasing; that such loss is of such magnitude and amount, and such deficit is growing and increasing in amount from week to week and from month to month, so that it is inevitable that the assets, including the entire value of said railroad company, will be entirely absorbed thereby, if the same has not already been absorbed; that such operation of said property is at present being performed under the compulsory process of the temporary writ of injunction issued herein, and as defendants are advised, cannot be abandoned without the defendants being in contempt of such proceedings and of this court, and that said temporary writ of injunction was issued at the

instance of plaintiff without notice to the defendant and without hearing thereon; that by reason of the facts aforesaid, and the facts hereinbefore set out in this answer, the private property of the defendant Eastern Texas Railroad Company is being taken for public use, and the defendant Eastern Texas Railroad Company is being deprived of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and in violation of the provisions of the Constitution of the State of Texas; that said writ of injunction was granted and ordered to be issued by the Honorable George Calhoun, Judge of the Fifty-Third Judicial District Court of the State of Texas on the 9th day of July 1920 enjoining and restraining each of the defendants herein, and each of their agents, servants and employes

11 until the further order of court, from abandoning the main line of the Eastern Texas Railroad Company, or any portion thereof, and from ceasing and discontinuing the operation of said line of railway, or any part thereof, for the transportation of passengers and freight in intrastate commerce; that said injunction was issued at the instance of the plaintiff herein, representing and acting for the public, including all persons using the lines of said Eastern Texas Railroad Company as a common carrier; and defendants aver

that such injunction was unauthorized, was improvidently issued, and was and is an unwarranted interference with the rights of said defendant railroad company in the lawful use of its property, and commands and compels the defendants herein to perform, or attempt to perform, acts not required by the laws of the State of Texas and the United States, and acts which the defendants fear are dangerous to persons and property, and these defendants respectfully submit to the court that they should not be required by judicial process, to perform the acts therein commanded and required; and defendants aver that the defendant Eastern Texas Railroad Company is entitled to be protected by a decree and order of this court to the peaceful and quiet possession and enjoyment of its said property, and the lawful use and disposition thereof.

Wherefore, premises considered, defendants pray that the writ of injunction heretofore issued be dissolved, and that a judgment and decree herein be entered in favor of defendants against the plaintiff on the cause of action declared upon in said Bill of Complaint quieting the defendant, the Eastern Texas Railroad Company in the possession of its property and in the use and disposition thereof, and the defendants recover of and from the plaintiff all costs in this behalf expended, and for such other and further relief as the defendants, or either of them, may be entitled to in the premises.

(Signed)

E. B. PERKINS,

DANIEL UPTHEGROVE,

E. J. MANTOOTH,

Attorneys for Defendants

Before the Interstate Commerce Commission.

No. —.

Application of the Eastern Texas Railroad Company to Abandon the Operation of its Lines of Railway Situated in the Counties of Trinity and Houston, in the State of Texas, and to Take Up and Remove its Tracks and to Sell and Dispose of the Salvage of said Properties.

E. B. Perkins,
1162 Great Southern Life Building,
Dallas, Texas;

Daniel Upthegrove,
1710 Railway Exchange Building,
St. Louis, Missouri.

E. J. Mantooth,
Lufkin, Texas,
Attorneys for Applicant.

46 Before the Interstate Commerce Commission.

No. —.

Application of the Eastern Texas Railroad Company to Abandon the Operation of its Lines of Railway Situated in the Counties of Trinity and Houston, in the State of Texas, and to Take Up and Remove its Tracks and to Sell and Dispose of the Salvage of said Properties.

To the Honorable Interstate Commerce Commission:

Now comes the Eastern Texas Railroad Company and files this, its application to abandon the operation of its lines of railway and take up and remove the tracks, buildings, structures, etc., constituting the same, and respectfully shows to the Commission:

I.

Your applicant is a railroad company, duly and legally incorporated under the laws of the State of Texas, by virtue of articles of incorporation filed in the office of the Secretary of State of the State of Texas, on the 8th day of November, 1900, and amendments thereof filed at dates subsequent thereto; that its post office address is Lufkin, Texas, and J. M. Herbert, 1704 Railway Exchange Building, St. Louis, Mo., is president, and E. J. Mantooth, Lufkin, Texas, is secretary, and E. B. Perkins, 1162 Great

Southern Life Building, Dallas, Texas; Daniel Upthegrove, 1710 Railway Exchange Building, St. Louis, Mo., and E. J. Mantooth, Lufkin, Texas, are attorneys for applicant; that by said articles of incorporation your applicant was authorized to construct a line of railway from the town of Lufkin, in Angelina County, through said county and the counties of Trinity and Houston, to the town of Ken-nard, in Houston County, Texas, a distance of 30.3 miles. That under and by virtue of such authority your applicant has constructed, maintained and operated a main line of railway 30.3 miles in length, together with sidings, spur tracks, buildings, structures, etc., and is now the owner of the same, and in possession thereof, and is now and has been since the date of its incorporation engaged in interstate commerce.

II.

That the present and future public convenience and necessity permit of the abandonment of the operation of its said lines of railway and the removal of the tracks, buildings, structures and other property constituting the same, and in this connection applicant avers:

(a) That prior to the construction of the lines of railway now owned and operated by your applicant, the territory traversed thereby was sparsely populated, and the production of merchantable or other articles to be transported therefrom as then and theretofore produced were not sufficient to justify the construction, maintenance and operation of a line of railway through such territory; that such territory was then furnished railroad transportation facilities and served by the International & Great Northern Railroad on the one side and the Houston East & West Texas Railway lines and the St. Louis Southwestern Railway Company of Texas lines on the other side, so that there was no portion of said territory a greater distance from a railroad station than eighteen or twenty miles, and the commodities produced for transportation could be handled by the ordinary wagon haul to such stations; that the same was true in regard to commodities destined for consumption in said territory, which latter commodities could be and were so transported by wagon haul; that the soil of such territory was and is of a general character that is not adapted to extensive and profitable agricultural and stock-raising business or production, with the exception that some of the bottoms along the creeks and rivers were productive; that the territory contained a large amount of merchantable pine timber, 49 the greater portion of which was such a distance from railway transportation that such timber and logs could not be wagon hauled to the railway lines, and the lumber cut therefrom could not be wagon hauled to railway lines in quantities and at an expense that the traffic would bear. Thereupon, and under the circumstances, the Texas & Louisiana Lumber Company and the Central Coal & Coke Company, and persons interested in said companies owning same, acquired title or control of a large portion of the merchantable pine timber in such territory and projected, financed and

had constructed lines of railway owned by your applicant, and organized and established your applicant as a railway company for the purpose of constructing, maintaining and operating said lines of railway, thereby enabling said companies and the persons interested therein to construct, erect and build a large sawmill near the station of Kennard and Ratcliff, on said lines of railway, to cut, saw and manufacture such timber into merchantable lumber and other timber products. That said lumber companies did so construct its plant with a large manufacturing capacity, and did build and construct the necessary buildings therefor, and for the accommodation and residence of its officers, agents and employes, and did build and construct a large sawmill industry, which continued from the date of the commencement of the operation thereof until about the year 1917, during the period that said mill and plant was operated therefrom.

50 produced therefrom a large amount of lumber and other products for the market, and the same was transported by the lines of railway of your applicant, and your applicant's receipts therefrom, and from the other articles of commerce reported were sufficient to pay the expenses of operation, maintenance and necessary additions and betterments of said lines of railway, the same were maintained and operated in a safe condition; the reason of the fact that said lines of railway cross many streams, and rivers that drain said territory, there is a great deal of bridge work, trestles, culverts, and because of this, and because of climatic conditions, such as heavy rainfalls, overflows, excessive heat and other conditions peculiar to the climate and the character of the soil, the lines of railway are very expensive to maintain.

(b) That about the year 1917 the Lumber Companies operating said mill, having cut out all the merchantable pine timber tributary to said mill, determined to remove, and did remove, the plant and sawmill therefrom, and the transportation of the products of said mill thereby necessarily ceased and your applicant no longer received any revenue from this source.

(c) That since the abandonment and removal of said plant, your applicant derives no revenue from the operation of the road except a small amount derived from passenger service.

51 small amount derived from the transportation of farm products, an occasional car of live stock and some miscellaneous shipments, and the total revenue derived from all transportation performed by your applicant is insufficient to pay the operating expenses, maintenance and necessary additions and betterments of said line of railway, and in the opinion of your applicant there is no system of rates or character of operation of the road whereby such traffic could afford to pay the expenses thereof; the said lines of railway are now, with the most economical management, being operated at a loss and deficit, and such loss and deficit will continue from year to year in the future. That said deficit for the year 1918 amounted to the sum of \$21,210.44 and for the year 1919 amounted to the sum of \$49,362.64.

(d) That the population along said lines of railway is very sparse and so far as your applicant can learn, or is advised, there is no prospect of any increased development in said territory tributary to its lines of railway, but your applicant is advised and believes that the productive conditions of said territory are declining rather than improving.

III.

Your applicant further shows that it has had a careful estimate made, which shows the following:

(a) That its lines of railway are constructed of thirty-five 52 (35) pound steel, which is badly surfaced and line bent and said lines, by reason of the ties, roadbed and structures being in a badly deteriorated condition, are now in an unsafe condition for operation and that said lines cannot be put in a safe operating condition except by a large expenditure of money; that applicant has had a careful inspection made of its said lines and has had an estimate compiled showing the amounts necessary to expend for the years 1920 and 1921 for maintenance, additions and betterments, necessary to put its lines of railway in a safe condition for operation, which shows that such expenditures will amount to the sum of \$125,992.00 for the year 1920, and the sum of \$87,141.00 for the year 1921.

(b) That the operation of its lines of railway are now conducted as economically as can be attained and the expense thereof amounts to about \$8,000.00 per month, and will increase by reason of large items of deferred maintenance accruing under Federal control.

(c) That your applicant has no rolling stock except a combination coach and baggage car, and has no other property or assets except the property constituting its said lines of railway.

(d) That your applicant has no bonded indebtedness.

(e) That the outstanding capital stock of your applicant amounts to four thousand five hundred and forty-five shares (4,545), 53 of the par value of \$100.00 each, all of which is owned by the St. Louis Southwestern Railway Company, except ten shares held by the directors of your applicant; and your applicant is authorized by due and legal action of its stockholders and board of directors at a meeting of said stockholders and directors held at Lufkin, Texas, on the 2d day of June, 1920, to make this application.

Wherefore, premises considered, applicant prays that notice be issued, published and served as required by law, and that a hearing be granted your applicant and on final hearing hereof a certificate be issued by this Commission granting to your applicant permission and authority to abandon the operation of said lines of railway now owned and operated by this company and take up and remove the tracks thereof and dismantle and remove all of the structures from the right of way of this company, and dispose of the salvage of both

tracks and structures to the best interest of the stockholders of this company, and that in event any section or sections or part or parcels of said tracks, or any of said structures can be sold and disposed of as now situated to a better advantage to the stockholders of the company, that the same be sold or disposed of in that manner; and that this company be authorized to dispose of its right-of-way, depot grounds or any portion or parcels thereof to the best advantage of the stockholders of this company, and that any such sales may be made at private or public sale for cash or for credit as may be deemed to be to the best advantage, such order to be made upon such terms and conditions as in the judgment of the Commission the public convenience and necessity may require and may be reasonably and justly imposed, and that such other and further orders be entered as your applicant may be entitled to in the premises.

Respectfully submitted,

EASTERN TEXAS RAILROAD COMPANY,

By F. W. GREEN,
Vice President.

55 DISTRICT OF COLUMBIA.

City of Washington, ss:

Before me, the undersigned authority, on this day personally appeared F. W. Green, who, being by me duly sworn, on oath says that he is vice-president of the Eastern Texas Railroad Company, and that he is duly authorized by said company to make this application, and has read the above and foregoing application, and says that the facts stated therein are true and correct, except where stated upon information and belief, and where so stated, he believes the same to be true.

F. W. GREEN

Subscribed and sworn to before me this 3rd day of June, A. D. 1920.

RUDOLPH T. HARRELL,
Notary Public for the District of Columbia.

My commission expires June 7, 1921.

E. B. PERKINS,
1102 Great Southern Life Building,
Dallas, Texas;

DANIEL UPTHEGROVE,
1710 Railway Exchange Building,
St. Louis, Missouri;

E. J. MANTOOTH,
Lufkin, Texas,
Attorneys for Applicant.

56 Endorsed: No. 323. In Equity. The State of Texas, Plaintiff, v. Eastern Texas Railway Company, Inc., et al., Defendants. Defendants Answer. Filed November 15, 1920. D. H. Hart, Clerk U. S. District Court for Western District of Texas.

57 In the United States District Court in and for the Western District of Texas.

In Equity.

No. 323.

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY et al.

Supplemental Answer of Defendants.

Now comes the Eastern Texas Railroad Company, incorporated, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, defendants herein, and by leave of the court files this, their supplemental answer, and supplementing the allegations in their original answer filed herein the fifteenth day of November, 1920, file the following:

I.

Defendants show to the court that since the filing of their original answer herein, on the 15th day of November, 1920, the Interstate Commerce Commission have, in the matter of Application of the Eastern Texas Railroad Company for a Certificate of Convenience and Necessity, Finance Docket No. 4, under date of December 2, 1920, entered an order granting a Certificate of Convenience and Necessity authorizing the Eastern Texas Railroad Company to abandon its lines of railway between Lufkin, Texas and Kendal Texas, which order embraces a report of the Commission, Division 4, Commissioner Meyer, Daniels, Eastman and Potter, and a certificate and order based upon such report authorizing the defendant, Eastern Texas Railroad Company to abandon the operation of all of the lines of railway now owned and operated by it and to take up, dismantle and remove any part or all of the property of said Company and in any lawful manner to dispose of any and all parts of said property so taken up, dismantled or removed, or as it is now situated, upon the terms and conditions specified and set out in said order, copy of which report and order is herewith filed marked "Exhibit B" and made a part hereof.

58 That defendant Eastern Texas Railroad Company accepts the terms and conditions of said Certificate and Order, and is willing and anxious to comply therewith in accordance with the provisions thereof, but is embarrassed and restrained in the exercise

of the authority and right granted to it by said Certificate and order by reason of the fact that the State of Texas, plaintiff herein, did on the 9th day of July, 1920, present to the Honorable Geo. Calhoun, Judge of the 53d, Judicial District of Texas its petition and Bill of Complaint herein, and procured the said Calhoun to make and enter an order as follows, to-wit:

"Austin, Texas, July 9th, 1920.

In Chambers.

Plaintiff's application for a temporary injunction, upon presentation and inspection by the court, is hereby granted as prayed for, and it is accordingly directed that the Clerk of this Court issue a temporary writ of injunction enjoining and restraining each of the defendants, and each of their agents, servants and employes until the further order of this Court from abandoning the main line of the Eastern Texas Railroad, or any part thereof, and from ceasing or discontinuing the operation of said line of Railroad, or any part thereof, for the transportation of passengers and freight in intra-state commerce.

This order is made subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

GEO. CALHOUN,
Judge 53d District Court of Texas.

and did procure the clerk of said court to issue a temporary writ of injunction in accordance with said order, and procured service thereof on each of the defendants herein, whereby they are in form restrained from exercising the right of complying with the Certificate and order so made by said Interstate Commerce Commission, as hereinbefore set forth, unless and until an order is made by this court dissolving and setting aside said temporary writ of injunction.

2.

The defendants are advised and believe, and allege the fact to be that said order for a temporary writ of injunction, and said writ of injunction issued thereon, were not and are not authorized and are of no force or effect, for the reasons set forth in defendants' original Answer filed herein, and for the further reasons that the petition and Bill of Complaint of plaintiff herein states no cause of action authorizing the making of such order or issuing such writ of injunction, and that the same were not authorized by the 59 rules of law or equity; and for the further reason that said order and writ of injunction were made and issued in violation of the Constitution of the United States and the Acts of Congress set forth and referred to in Defendants' Original Answer filed herein.

Wherefore, defendants pray, as in their Original Answer, that said temporary writ of injunction be dissolved, and pray for such further orders and relief as they may be entitled to in the premises, and for costs of suit.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,
W. B. HAMILTON.

Attorneys for Defendants.

Endorsed: In Equity, No. 323, State of Texas v. Eastern Texas Railroad Company et al. Defendants' Supplemental Answer. Filed December 18, 1920. D. H. Hart, Clerk, by A. B. Coffee, Deputy.

60 THE STATE OF TEXAS,
County of Bexar:

E. J. Mantooth, being duly sworn according to law, deposes and says: That he is one of the attorneys for the defendants in the above entitled cause and is General Attorney of the Eastern Texas Railroad Company, a corporation, whose principal office and place of business is in the Eastern District of Texas, and is authorized to verify the foregoing pleading. That the allegations made in the foregoing pleading are made upon information and belief, and affiant believes the facts alleged to be true, and upon such information and belief affiant alleges that the same are true.

E. J. MANTOOTH.

Subscribed and sworn to before me this the 15th day of March, A. D. 1921.

[SEAL.]

D. H. HART,
Clerk U. S. District Court,
By T. H. THOMPSON,
Deputy.

61 Exhibit "B" referred to in the foregoing Supplemental Answer of Defendants, the Report of the Commission, Division 4, Finance Docket No. 4, and also a Certificate of Public Convenience and Necessity which appears in this record mentioned in the sixth paragraph of the stipulation herein.

Defendants' Petition for Removal.

Filed Oct. 4, 1920.

In the District Court of Travis County for the 53rd Judicial District.

No. —.

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY et al.

Defendants' Petition for Removal.

Petitioners, Eastern Texas Railroad Company, F. W. Green, E. B. Perkins, Daniel Upthegrove, and E. J. Mantooth, defendants in the above entitled cause, and being all the defendants therein, present this their petition for removal of this suit to the District Court of the United States for the Western District of Texas, Austin Division, held at the city of Austin in said State, and as ground therefor respectfully show:

1.

That the above cause is a suit of a civil nature in Equity, of which the district courts of the United States are given original jurisdiction, and that the matter or amount in dispute exceeds the sum of \$3,000.00 exclusive of interest and costs.

2.

That this suit arises under the Constitution and Laws of the United States as is manifest from Plaintiff's original petition filed herein and as is hereinafter more fully shown.

3.

Your petitioners show that they are each citizens of the United States; that the defendant Eastern Texas Railroad Company is a railway corporation organized under the laws of the State of Texas and has its domicile and principal place of business at Lufkin, Angelina County, Texas, and its line of railway extends through and into the counties of Angelina, Houston and Trinity, in the State of Texas, and in no other counties, and it has offices and agents in said counties and no other counties or places; that the defendant F. W. Green is a resident and citizen of the City of St. Louis,

State of Missouri; the defendant E. B. Perkins is a resident and citizen of the city and county of Dallas, State of Texas; that the defendant Daniel Upthegrove is a resident and citizen of the City of

St. Louis, Missouri; and the defendant E. J. Mantooth is a resident and citizen of the town of Lufkin, County of Angelina, State of Texas.

4.

That from and since the time of the completion of its line of railroad in the year 1902, the defendant Eastern Texas Railroad Company has been and is now engaged in interstate commerce as well as intrastate commerce, and in the hauling and transportation of freight and passengers from points on its line in Texas destined to points in the States of Arkansas, Louisiana and Oklahoma, and other States of the United States, and also in transporting and hauling passengers and freight from its connecting lines on shipments and journeys originating in such other states destined to points in Texas. That on February 28, 1920, the Congress of the United States passed an Act entitled "An Act to Provide for the Termination of Federal Control of Railroads and Systems of Transportation; To Provide for the Settlement of Disputes between Carriers and their employees; To Further Amend an Act entitled 'An Act to Regulate Commerce' approved February 4, 1887, as amended, and for other *other* purposes," which said Act was duly approved by the President of the United States, and became and now is a law of the United States of America. That subsections 18, 19 and 20, of Section 402, of said Act are as follows:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there

shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity

require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice

shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of

this paragraph or of paragraph (18) or (19) of this section
65 may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000.00 or by imprisonment for not more than three years, or both."

6.

That the defendant, Eastern Texas Railroad Company, acting under the above mentioned Act of Congress of the United States on the 3rd day of June, 1920, filed its application with the Interstate Commerce Commission of the United States at Washington, D. C., for a certificate of public convenience and necessity praying that it be granted authority to abandon its said line of railway and the stations thereon, and that said application is still pending before said Interstate Commerce Commission, and said Commission acting through its duly constituted officers and examiners has taken testimony in support of and against the said application, but said case has not been reached for final action before said Commission.

7.

That this suit is brought by the State of Texas against the said Eastern Texas Railroad Company, and the other defendants herein who are officers and attorneys for said defendant railway company to restrain and enjoin these defendants and each of them, their agents, servants and employees from abandoning said line of railroad or any part thereof, and from ceasing or discontinuing
66 the operation of same, or any part thereof, and from ceasing or discontinuing the operation of said line of railroad or any

part thereof for the transportation of passengers and freight in intrastate commerce, and for the making of such injunctions perpetual. And in its petition the plaintiff, the State of Texas, alleges that the provisions of said Act to Congress hereinabove referred to and designated in plaintiff's petition herein as "said Federal Transportation Act" is unconstitutional and void in so far as it appears to bestow or confer upon railroad companies engaged in intrastate commerce the right or authority to abandon their instrumentalities of intrastate commerce without the consent of the states in which such instrumentalities are exercised because Plaintiff avers that said provisions and said Act of Congress are contrary to those constitutional provisions which prohibit the impairing of the obligations of contracts, and which reserve to the States all of their sovereign powers, except such as have been delegated by them to the Federal Government, and particularly their sovereign powers to regulate and preserve their instrumentalities of purely local commerce, and alleges "that if said quoted provision of said transportation act is to be construed as attempting to confer on the Interstate Commerce Commission power and authority to authorize the defendant the Eastern Texas Railroad Company to cease the operation of its said main line of railroad, and to abandon same and remove it, then said provision is unconstitutional, null and void, because it constitutes an attempt by the Federal Congress to confer upon the Interstate Commerce Commission the power to exercise and prescribe police regulations

in a matter which is reserved to and falls wholly within the
67 jurisdiction and sovereignty of the State of Texas, and because it constitutes and is an attempt to confer authority upon the Interstate Commerce Commission to impair and destroy the obligations of said Railroad Company to the State of Texas and its people as fixed and evidenced by a valid and subsisting contract between the State of Texas and said defendant Railroad company."

That this action *arised* under the constitution and laws of the United States in that the constitutionality of said Act of Congress is directly raised by the Plaintiff in its petition herein, and the question of the force and effect of said Act of Congress and the power and authority of the Interstate Commerce Commission under said Act of Congress and the legal effect of the certificate of public convenience and necessity provided for in said Act of Congress and applied for in the application filed with it by said Eastern Texas Railroad Company are involved herein.

Petitioners present a good and sufficient bond as provided by the statutes in such cases, that they will enter into the District Court of the United States for the Western District of Texas, Austin Division, within thirty days from the filing of this petition, a certified copy of the record in this suit, and for the payment of all costs which

may be awarded by said court if the said District Court of the Western District of Texas shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, petitioners pray that this court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court as provided by law, and as in duty bound your petitioners will ever pray.

EASTERN TEXAS RAILROAD COMPANY,
By E. J. MANTOOTH,
E. W. GREEN,
DANIEL UPTHEGROVE,
E. J. MANTOOTH.

STATE OF TEXAS,
County of Dallas:

E. J. Mantooth, being duly sworn, according to law, says:
That he is Secretary of the Eastern Texas Railroad Company, a corporation, and is familiar with the facts set forth in the above petition for removal, and is authorized to make this affidavit for said Eastern Texas Railroad Company, and that he is also one of the defendants mentioned in said petition, and that he has read the foregoing petition and that the facts set forth therein are true.

E. J. MANTOOTH.

Sworn and subscribed to before me this the 2nd day of October, A. D. 1920.

[SEAL.]

E. LEVY,
Notary Public,
Dallas County, Texas.

STATE OF MISSOURI
City of St. Louis:

E. W. Green and Daniel Upthegrove, being each duly sworn according to law, severally depose and say:

I am one of the petitioners in the above written petition and have read said petition, and the allegations therein set forth are true.

E. W. GREEN.
DANIEL UPTHEGROVE

Sworn and subscribed to before me this the 9th day of September A. D. 1920.

[SEAL.]

ELIZABETH MOREDOCK,
Notary Public,
City of St. Louis, Missouri.

STATE OF TEXAS,
County of Dallas:

E. B. Perkins, being duly sworn according to law, deposes and says:

I am one of the petitioners in the above written petition and have read said petition and the same is true.

E. B. PERKINS.

Sworn and subscribed to before me this the 25th day of September, A. D. 1920.

[SEAL.]

ISABELLE ABRIGHT,

*Notary Public,
Dallas County, Tex.*

(Endorsed:) No. 37715, State of Texas vs. Eastern Texas Railroad Company, et al. In the District Court of Travis County for the 53rd Judicial District. Defendants' petition for removal. Filed Oct. 4, 1920, S. A. Philquist, Clerk.

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Bond for Removal.

Oct. 4, 1920.

In the District Court of Travis County, Texas, for the 53rd Judicial District.

No. —.

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY et al.

Order of Removal.

Bond for Removal.

Know all men by these presents: That we, Eastern Texas Railroad Company, a corporation with its principal office at Lufkin, Angelina County, Texas, E. B. Perkins of Dallas County, Texas, F. W. Green and Daniel Upthegrove of the city of St. Louis, State of Missouri, and E. J. Mantooth of Lufkin, Angelina County, Texas, as principal, and American Surety Company of New York, as Surety, are held and firmly bound unto the State of Texas, plaintiff in the above entitled cause, in the sum of One Thousand (\$1,000.00) Dollars lawful money of the United States of America, for the payment of which well and truly to be made we, and each of us bind ourselves, and each of us, our heirs, executors and administrators, jointly and severally by these presents.

That the conditions of this obligation are such that whereas, the said Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove, E. J. Mantooh, have applied by petition to the 53rd Judicial District Court of the State of Texas in and for the County of Travis for the removal of a certain cause therein pending, wherein the State of Texas is plaintiff and the said Eastern Texas

Railroad Company, E. B. Perkins, F. W. Green, Daniel Up-
71 thegrave and E. J. Mantooh are defendants, to the District

Court of the United States for the Western District of Texas, Austin Division, for further proceedings, on the grounds in said petition set forth, and that all further proceedings in said action — the said 53rd Judicial District Court of Travis County, Texas, be stayed.

Now, therefore, If your petitioners, the said Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooh, shall enter in said District Court of the United States for the Western District of Texas, Austin Division, aforesaid within thirty days from the date of the filing of said petition, a certified copy of the record in such suit, and shall pay, or cause to be paid, all costs that may be awarded therein, by said District Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto then this obligation shall become void, otherwise it shall remain in full force and effect.

[SEAL] EASTERN TEXAS RAILROAD COMPANY,

By F. W. GREEN,

Vice-President.

DANIEL UPTHEGROVE,

E. B. PERKINS,

E. J. MANTOOTH,

Principal.

Attest:

[SEAL] E. J. MANTOOTH,

Secretary Eastern Texas Railroad Company.

Approved

GEO. CALHOUN,

District Judge 53rd Judicial District of Texas.

(Endorsed:) No. 37715. The State of Texas vs. Eastern Texas Railroad Company et al. Bond for Removal. Filed Oct. 4th, 1920
S. A. Philquist, clerk

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Order of Removal.

Oct. 19, 1920.

37715.

STATE OF TEXAS

VS.

EASTERN TEXAS RAILROAD COMPANY et al.

Order of Removal.

This cause coming on for hearing upon petition and bond of the defendants herein for an order transferring this cause to the United States District Court for the Western District of Texas, at Austin, and it appearing to the Court that the defendants did on October 4, 1920 file their petition for such removal in due form of law, and that the defendants on the same day filed their bond duly conditioned, with good and sufficient sureties as provided by law, and that the defendants have given plaintiff due and legal notice thereof, and it appearing to the court that this is a proper cause for removal to said District Court of the United States:

Now, therefore, said petition and bond having been accepted, it is hereby ordered and adjudged that this cause be, and it hereby is removed to the United States District Court for the Western District of Texas, at Austin, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this the 19th day of October, A. D. 1920.

GEO. CALHOUN.

*Judge.*73 *Temporary Injunction to Eastern Texas Railroad Company.*

Issued July 9, 1920.

The State of Texas to the Eastern Texas Railroad Company, of which E. J. Mantooth is Secretary and Agent, Greeting:

Whereas, in a certain cause pending on the docket of the District Court of Travis County, within and for the 53rd Judicial District of Texas, being cause No. 37,715, wherein the State of Texas is plaintiff and the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth are defendants; in said cause the said plaintiff, by and through its Attorney General, the Honorable C. M. Cureton, has filed its petition asking for the granting of the Court's most gracious writ of injunction to enjoin and restrain the defendants, and each of them, their agents, servants and employees from abandoning the line of railway of the defendant the Eastern Texas Railroad Company, running in and through the counties of Trinity and Houston, or any part thereof, and from

ceasing or discontinuing the operation of said line of railroad, or any part thereof, for the transportation of passengers and freight in intrastate commerce; plaintiff alleges that on the 3rd day of June, 1920, defendant the Eastern Texas Railroad Company filed with the Interstate Commerce Commission its certain written application for authority to abandon its said lines of railway situated in the Counties of Trinity and Houston in the State of Texas, and for authority to

take up and remove its said tracks and for authority to sell 74 and dispose of the salvage of said properties, and said defendant Railroad Company is proceeding to prosecute before

the Interstate Commerce Commission its said application with a view to obtaining from said commission a certificate of the character attempted to be authorized by the terms of said act and described fully in plaintiff's original petition on file among the files in this office; plaintiff further alleges that said main track of said defendant railroad is a substantial and important instrumentality of purely intrastate commerce, having its points of origin and points of destination wholly within the State of Texas, and that if said defendant railroad company procures from the Interstate Commerce Commission said certificate which it is attempting to procure, it and the other defendant herein named, will in conformity with the purported authority attempted to be conferred by such certificate, immediately abandon the operation of its said main track and will thereby immediately and irreparably damage the people of Texas who from day to day desire to use and do use said line of railroad as a common carrier for the transportation of passengers and freight in purely local as distinguished from interstate commerce; the Honorable George Calhoun, Judge of said Court, upon presentation and consideration of said petition has entered thereon the following order to-wit:

"In Chambers.

Austin, Texas, July 9th, 1920.

Plaintiff's application for a temporary injunction, upon presentation and inspection by the Court, is hereby granted as prayed for, and it is accordingly directed that the Clerk of this Court issue a temporary writ of injunction enjoining and restraining each of the defendants, and each of their agents, servants and employes until the further order of this Court from abandoning the main line of the Eastern Texas Railroad, or any part thereof, and from ceasing or discontinuing the operation of said line of Railroad, or any part thereof, for the transportation of passengers and freight in 75 intrastate commerce.

This order is made subject to the right of the defendants, or any of them to appear in this cause at any reasonable time and move the dissolution of said injunction.

GEO. CALHOUN,
Judge 53rd Judicial District of Texas.

These are therefore to enjoin and restrain, and you the said the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, and each of you, your agents, servants and employes, are hereby enjoined and restrained from abandoning the above mentioned main line of railway running through the counties of Trinity and Houston, or any part thereof, and from ceasing or discontinuing the operation of said line of railway, or any part thereof, for the transportation of passengers and freight in intrastate commerce; such order being made subject to the further orders of the Court herein made and entered, and subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

Herein fail not to obey this writ under the pains and penalties prescribed by Law.

Given under my hand and seal of office, at Austin, Texas, this the 9th day of July, A. D. 1920.

[SEAL.] *S. A. PHILQUIST,
Clerk District Court, Travis County, Texas.*

76 Came to hand on the 12th day of July, A. D. 1920, at 10 o'clock A. M., and executed on the 12th day of July A. D. 1920 at 2 o'clock P. M., by delivering to the within named, defendant the Eastern Texas Railroad Company, of which E. J. Mantooth is its Secretary and Agent, in person a true copy of this writ, at Lufkin, in Angelina County Texas.

*W. L. EVANS,
Sheriff Angelina County, Texas.*

(Endorsement.) No. 37715. The State of Texas vs. Eastern Texas Railroad Company, et al. Temporary Injunction to Eastern Texas Railroad Company. Issued July 9, 1920. S. A. Philquist, Clerk. Filed Oct. 4, 1920. S. A. Philquist, Clerk.

Temporary Injunction to E. B. Perkins.

Issued July 9, 1920.

The State of Texas to the Eastern Texas Railroad Company, of which E. J. Montooth is Secretary and Agent, Greeting:

Whereas, in a certain cause pending on the docket of the District Court of Travis County, within and for the 53rd Judicial District of Texas, being cause No. 37,715, wherein the State of Texas is plaintiff and the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth are defendants; in said cause the said plaintiff, by and through its Attorney General, the Honorable C. M. Cureton, has filed its petition asking for the granting of the Court's most gracious writ of injunction to enjoin

and restrain the defendants, and each of them, their agents,
77 servants and employes from abandoning the line of railway
of the defendant the Eastern Texas Railroad Company,
running in and through the counties of Trinity and Houston, or
any part thereof, and from ceasing or discontinuing the operation
of said line of railroad, or any part thereof, for the transportation of
passengers and freight in intrastate commerce; plaintiff alleges that
on the 3rd day of June, 1920, defendant the Eastern Texas Railroad
Company filed with the Interstate Commerce Commission its certain
written application for authority to abandon its said lines of railway
situated in the Counties of Trinity and Houston in the State of
Texas and for authority to take up and remove its said tracks and
for authority to sell and dispose of the salvage of said properties, and
said defendant Railroad Company is proceeding to prosecute before
the Interstate Commerce Commission its said application with a view
to obtaining from said commission a certificate of the character at-
tempted to be authorized by the terms of said act and described fully
in plaintiff's original petition on file among the files in this office;
plaintiff further alleges that said main track of said defendant
railroad is a substantial and important instrumentality of purely
intrastate commerce, having its points of origin and points of desti-
nation wholly within the State of Texas, and that if said defendant
railroad company procures from the Interstate Commerce Commis-
sion said certificate which it is attempting to procure, it and the
other defendant herein named, will in conformity with the pur-
ported authority attempted to be conferred by such certificate, imme-
diately abandon the operation of its said main track and will thereby
immediately and irreparably damage the people of Texas who from
day to day desire to use and do use said line of railroad as a common
carrier for the transportation of passengers and freight in purely
local as distinguished from interstate commerce; the Honorable
George Calhoun, Judge of said Court, upon presentation and
78 consideration of said petition has entered thereon the follow-
ing order, to-wit:

"In Chambers,

Austin, Texas, July 9th, 1920.

Plaintiff's application for a temporary injunction, upon presenta-
tion and inspection by the Court, is hereby granted as prayed for,
and it is accordingly directed that the Clerk of this Court issue a
temporary writ of injunction enjoining and restraining each of the
defendants, and each of their agents, servants and employes until
the further order of this Court from abandoning the main line of the
Eastern Texas Railroad, or any part thereof, and from ceasing or
discontinuing the operation of said line of Railroad, or any part
thereof, for the transportation of passengers and freight in intra-
state commerce.

This order is made subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

GEO. CALHOUN,
Judge 53rd Judicial District of Texas.

These are therefore to enjoin and restrain, and you the said the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Denid Upthegrove and E. J. Mantooth, and each of you, your agents, servants and employes, are hereby enjoined and restrained from abandoning the above mentioned main line of railway running through the counties of Trinity and Houston, or any part thereof, and from ceasing or discontinuing the operation of said line of railway, or any part thereof, for the transportation of passengers and freight in intrastate commerce; such order being made subject to the further orders of the Court herein made and entered, and subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

Herein fail not to obey this writ under the pains and penalties prescribed by Law.

Given under my hand and seal of office, at Austin, Texas,
this the 9th day of July, A. D. 1920.

S. A. PHILQUIST,
[Seal] *Clerk District Court, Travis County, Texas.*

Sheriff's Return.

Came to hand July 12th, 1920, and executed July 13th, 1920, by delivering to E. B. Perkins in person a true copy of this writ at Dallas, Dallas County, Texas.

DAN HARSTON,
Sheriff Dallas County, Texas.
By JACK GORMAN,

Dep.

Fee \$1.25.

(Endorsed:) No. 37715. The State of Texas vs. Eastern Texas Railroad Company, et al. Temporary Injunction to E. B. Perkins. Issued July 9, 1920, S. A. Philquist, Clerk. Filed Oct. 4, 1920, S. A. Philquist, Clerk.

Temporary Injunction to E. J. Mantooth.

Issued July 9, 1920.

Temporary Injunction to E. J. Mantooth.

The State of Texas to E. J. Mantooth, Greeting:

Whereas, in a certain cause pending on the docket of the District Court of Travis County, within and for the 53rd Judicial District of Texas, being cause No. 37,715, wherein the State of Texas is

plaintiff and the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth are 80 defendants; in said cause the said plaintiff, by and through its Attorney General, the Honorable C. M. Cureton, has filed its petition asking for the granting of the Court's most gracious writ of injunction to enjoin and restrain the defendants, and each of them, their agents, servants and employes from abandoning the line of railway of the defendant the Eastern Texas Railroad Company, running in and through the counties of Trinity and Houston, or any part thereof, and from ceasing or discontinuing the operation of said line of railroad, or any part thereof, for the transportation of passengers and freight in intrastate commerce; plaintiff alleges that on the 3rd day of June, 1920, defendant, the Eastern Texas Railroad Company filed with the Interstate Commerce Commission its certain written application for authority to abandon its said line of railway situated in the Counties of Trinity and Houston in the State of Texas, and for authority to take up and remove its said tracks and for authority to sell and dispose of the salvage of said properties, and said defendant Railroad Company is proceeding to prosecute before the Interstate Commerce Commission its said application with a view to obtaining from said commission a certificate of the character attempted to be authorized by the terms of said act and described fully in plaintiff's original petition on file among the files in this office; plaintiff further alleges that said main track of said defendant railroad is a substantial and important instrumentality of purely intrastate commerce, having its points of origin and points of destination wholly within the State of Texas, and that if said defendant railroad company procures from the Interstate Commerce Commission said certificate which it is attempting to procure, it and the other defendants herein named, will in conformity with the purported authority attempted to be conferred by such certificate, immediately abandon the operation of its said main track and will thereby immediately and irreparably damage the people of Texas who from day to day desire to use and do use said line of railroad as a common carrier for the transportation of passengers and 81 freight in purely local as distinguished from interstate commerce; the Honorable George Calhoun, Judge of said Court, upon presentation and consideration of said petition has entered the following order, to-wit:

"In Chambers.

Austin, Texas, July 9th, 1920.

Plaintiff's application for a temporary injunction, upon presentation and inspection by the Court, is hereby granted as prayed for and it is accordingly directed that the Clerk of this Court issue a temporary writ of injunction enjoining and restraining each of the defendants, and each of their agents, servants and employes until the further order of this Court from abandoning the main line of the Eastern Texas Railroad, or any part thereof, and from ceasing or discontinuing the operation of said line of Railroad, or any part,

thereof, for the transportation of passengers and freight in intrastate commerce.

This order is made subject to the right of the defendants, or any of them, to appear in this cause at any reasonable time and move the dissolution of said injunction.

GEO. CALHOUN,
Judge 53rd Judicial District of Texas.

These are therefore to enjoin and restrain, and you the said the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantom, and each of you, your agents, servants and employes, are hereby enjoined and restrained from abandoning the above mentioned main line of railway running through the counties of Trinity and Houston, or any part thereof, and from ceasing or discontinuing the operation of said line of railway, or any part thereof, for the transportation of passengers and freight in intrastate commerce; such order being made subject to the further orders of the Court herein made and entered, and subject to the right of the defendants, or any of them to appear in this cause at any reasonable time and move the dissolution of said injunction.

82 Herein fail not to obey this writ under the pains and penalties prescribed by law.

Given under my hand and seal of office, at Austin, Texas, this the 9th day of July, A. D. 1920.

S. A. PHILQUIST,
Clerk District Court, Travis County, Texas.

Came to hand the 12th day of July A. D. 1920, at 10 o'clock A. M. and executed on the 12th day of July A. D. 1920, at 2 o'clock P. M., by delivering to E. J. Mantom the within named Defendant, in person a true copy of this writ, at Lufkin, in Angelina County, Texas.

W. L. EVANS,
Sher. Angelina Co., Tex.

[Endorsed:] No. 37,715. The State of Texas vs. Eastern Texas Railroad Company et al. Temporary Injunction to E. J. Mantom, issued July 9, 1920, S. A. Philquist, clerk. Filed Oct. 4, 1920. S. A. Philquist, clerk.

83 In the United States District Court in and for the Western District of Texas.

In Equity.

No. 323.

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY et al.

Defendants' Motion to Dissolve Temporary Writ of Injunction.

Now come the defendants in the above entitled cause and move the court to dissolve and set aside the temporary injunction issued herein July 9, 1920 by the clerk of the Fifty-Third Judicial District Court in and for Travis County, State of Texas, upon the order of Judge Geo. Calhoun, Judge of said Court, for the following reasons to wit:

1.

For the reason that the petition and bill of complaint filed by plaintiff herein does not set up and allege any cause of action, either in law or in equity, authorizing the granting of a temporary writ of injunction, or the issuance of such writ.

2.

For the reason that the petition and bill of complaint filed by plaintiff herein shows on its face that the matters and things complained of therein, which it is alleged were wrongfully to be done by the defendants, were matters and things authorized to be done by the Constitution and laws of the United States, and were therefore lawful, and could not be lawfully restrained by writ of injunction from the District Court of the State of Texas nor by writ of injunction from this court.

3.

For the reason that the matters of fact pleaded and set forth in the Original Answer and in the Supplemental Answer of Defendants filed herein, in reply to, denial of, and in explanation of the allegations contained in the petition and bill of complaint of the plaintiff filed herein, show that the plaintiff had not at the time of the filing of said petition and bill of complaint any cause of action against the defendants herein, or either of them, which authorize the issuance of a temporary writ of injunction.

4.

For the reason that the Constitution of the United States authorizes Congress to regulate commerce between the states and foreign nations and the Indian Tribes, and authorizes Congress to pass all laws necessary to carry into effect the provisions of the Constitution, and the further fact that the Congress in the exercise of the powers thus conferred, enacted the Transportation Act of 1920, wherein they conferred upon the Interstate Commerce Commission full power and authority to issue the defendant, Eastern Texas Railroad Company, a Certificate of Public Convenience and Necessity, empowering and authorizing said Railroad Company to abandon the operation of its lines of railway, and take up and remove the tracks, structures and property constituting the same, and to make lawful disposition thereof, or to dispose of the same as situated, either in whole or in part; and the further fact that said Interstate Commerce Commission has, on the application of the defendants, Eastern Texas Railroad Company, made, under the provisions of said Transportation Act, an Application for such certificate, which application has been granted, and fully empowers the said Railroad Company to abandon the operation of the said railway lines and dispose of the property constituting the same in accordance therewith, and upon the terms and conditions therein provided, which terms and conditions are accepted by said Railroad Company, whereby and by all of which the paramount law of the United States makes such action lawful.

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5.

For the reason that it is apparent upon the entire record herein that the temporary writ of injunction issued as aforesaid was issued and served without authority of law or the rules of equity.

Wherefore, defendants move the court to dissolve and set aside said injunction, and make such other orders and decrees herein as are authorized by the rules of law and equity in such proceedings, and for such other and further relief as the court may find the defendants entitled to, including recovery of their costs in this behalf expended.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,
W. B. HAMILTON,

Attorneys for Defendants.

[Endorsed:] Equity No. 323. State of Texas vs. Eastern Texas Railroad Co. et al. Defendants' Motion to Dissolve Temporary Writ of Injunction. Filed December 18, 1920. D. H. Hart, Clerk. By A. B. Coffee, Deputy.

86 In the United States District Court for the Western District of Texas, Austin Division.

No. 323, Equity.

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY.

Now comes the defendants and by leave of Court file this their supplemental motion to dissolve the injunction issued herein on the — day of July, 1920, by George Calhoun, Judge of the 53rd Judicial District Court of Travis County, State of Texas, and assign the following additional reasons:

First: Said injunction restrains J. M. Herbert, F. W. Green, Daniel Upthegrove, E. B. Perkins and E. J. Manton, to the same force and effect that it does the Eastern Texas Railroad Company, and defendants show to the Court that said Herbert and Green are President and Vice President of said Company, and said other three named parties are Attorneys in this cause and for said Company; that neither of them have done any act or made any threats to abandon the operation of the said railroad, or dismantle the same, except that as officers and attorneys they have proceeded in accordance with the Act of Congress known as the Transportation Act of 1920 by making application to the Interstate Commerce Commission for authority to abandon the operation of, and dismantle, the road, as is shown by the pleadings, and that such action is not such as should be restrained by this injunction.

Second: That defendants have, in good faith, proceeded in accordance with the provisions of the Transportation Act of 1920, and applied to the Interstate Commerce Commission, the tribunal designated by Congress, for authority to abandon the operation of said railroad, and to dismantle the same, and that said Interstate Commerce Commission have, pursuant to direction of Congress with reference to such application, giving the notices required, and having the hearing as required, and hearing the arguments re-

87 quired, and thereafter have made an order and issued a

Certificate of Public Convenience and Necessity authorizing the Railroad Company to abandon the operation of its line, and dismantle and dispose of the structures and superstructures constituting the same, together with all property of the said Company, and have directed how and in what manner that the same should be disposed of; that defendants have complied with said order and are now ready to give notice to the shipping public, as required by said order, that they will within thirty days cease the operation thereof, and to thereafter carry out the provisions of said order, but they are restrained by the injunction herein from complying with the authority granted

by Congress, which defendants submit is not authorized under the Constitution and Laws of the United States.

Wherefore, defendants pray as in their original motion to dissolve, and in addition thereto pray that the injunction be dissolved as to said personal defendants for the reasons aforesaid, and that said personal defendants be dismissed therefrom; And further pray that said injunction be dissolved as to the defendant, the Eastern Texas Railroad Company, and for such other orders and decrees as the defendants, or either of them, may be entitled to in the premises under the entire record now before this Court.

E. B. PERKINS,

E. J. MANTOOTH,

DANIEL UPTHEGROVE,

*Attorneys for Defendants,
Eastern Texas Railroad Company et al.*

[Endorsed:] No. 323. United States District Court, Western District of Texas, Austin Division. State of Texas v. Eastern Texas Railroad Co. Defendants' Supplemental Motion to Dissolve the Injunction. Filed March 15, 1921. D. H. Hart, Clerk, by T. H. Thompson, Deputy.

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EXHIBIT "A."

Interstate Commerce Commission,

Finance Docket, No. 4.

In the Matter of Application of the EASTERN TEXAS RAILROAD COMPANY for a Certificate of Convenience and Necessity.

Submitted Sept. 27, 1920; Decided Dec. 2, 1920.

Certificate of Convenience and Necessity Issued Authorizing the Eastern Texas Railroad Company to Abandon its Line of Railway Between Lufkin, Tex., and Kennard, Tex.

E. B. Perkins, Daniel Upthegrove, E. J. Mantooth, and E. B. Stroud, Jr., for Eastern Texas Railroad Company.

V. L. Brooks, S. N. Townsend, J. R. Painter, T. D. Fairchild, and Clay Stone Briggs, for Protestants.

John C. Box, for Lufkin Chamber of Commerce and Angelina County, Texas.

Report of the Commission.

Division 4.

Commissioners Meyer, Daniels, Eastman, and Potter.

By Division 4:

The Eastern Texas Railroad Company, hereinafter called the Eastern Texas, by petition filed June 3, 1920, seeks a certificate of

convenience and necessity to permit it to abandon its line of railway in Angelina, Trinity and Houston Counties, Texas.

89. The Eastern Texas extends from Lufkin, Tex., in a westerly direction, 30.3 miles to Kennard, Tex., and has in addition to this main line track about 4 miles of switch yard, and passing tracks. At Lufkin, its tracks connect with those of the St. Louis Southwestern Railway Company of Texas, hereinafter called the Cotton Belt, the Houston, East & West Texas Railroad, the Groveton, Lufkin & Northern Railway, the Texas Southeastern Railroad, and the Angelina & Neches River Railroad. Applicant has no other railroad connections. It maintains a joint agency with the Cotton Belt at Lufkin, has agency stations at Ratcliff, Tex., and Kennard, and has 6 sidetracks at other points where carload freight may be received or delivered. It owns 1 combination passenger mail and express car, but no other rolling stock. It rents 1 light locomotive from the Cotton Belt, and pays per diem, under the code rules, for foreign cars while on its line. The only regular service it maintains is 1 mixed freight and passenger train daily, except Sunday, between Lufkin and Kennard.

The Eastern Texas was incorporated November 8, 1900, under the general railroad incorporation laws of Texas, to construct a railroad from Lufkin to Crockett, Texas. Its line was constructed to Kennard in 1901 and 1902, and has been continuously operated since, though it has not been extended to Crockett. The company was promoted and financed by individuals interested in the Texas, Louisiana Lumber Company, hereinafter called the lumber company, which is a subsidiary of the Central Coal & Coke Company of Kansas City, Mo. A substantial amount of applicant's right of way was donated to it by the owners of the land. It never received a land grant from the State, nor exercised the right of eminent domain. It was originally authorized to issue \$150,000 capital stock, which amount was increased in 1902 to \$1,000,000. Shares of stock with

90. a par value of \$454,500, but no bonds, have been issued. On

September 1, 1916, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, hereinafter called the Southwestern, which, except for the directors' qualifying shares, still holds it. There is substantial identity between the officers of the Eastern Texas and the Southwestern, and the two roads have twice endeavored to consolidate since the stock purchase by the latter. The Texas legislature has refused to authorize the consolidation unless the Eastern Texas would extend its line to Crockett.

Applicant's line was constructed primarily to serve the Lumber Company, which then owned 116,000 acres of pine-timber land near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the south for the production of lumber and forest products. Applicant built numerous tram roads through his timber to connect with its main line. On August 28, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value \$94,601.49, to the lumber company. This sale was made in contemplation of the transfer of the Eastern Texas

stock to the Southwestern for bonds of that company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

The Ratcliff mill ceased operation about 1917, and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line.

Applicant contends that since the removal of the mill there is not, and within any reasonable time will not be, enough traffic offered to produce revenue sufficient to pay its operating expenses. It shows

that the county it serves is largely cut-over timber land, the

soil poor, and the agricultural development very limited except in the vicinity of Ratcliff and Kennard. It points out that the area is sparsely settled, particularly between those two towns where it is estimated that some 600 people live; and that there are no other towns or villages along the line. Ratcliff is said to have a population of 900 and that of Kennard is estimated at 1,200. The timber from some 20,000 acres of land, along applicant's line, owned by the Southern Pine Lumber Company, is transported either by the Texas Southeastern Railroad or the Groveton, Lufkin & Northern Railway. Three small mills, installed after the abandonment of the Ratcliff mill on account of the then abnormally high prices of lumber and forest products, ceased operating with the decline in the lumber market and were closed at the time of the hearing. The lumber company now owns about 84,000 acres of land surrounding Ratcliff and Kennard on some of which the second growth of timber is said to be of marketable size, but it is not yet in condition to be profitably cut.

About 70 per cent of the traffic handled by the Eastern Texas in 1919 consisted of forest products. Agricultural products totaled less than 10 per cent, and the remaining 20 per cent was made up of mine products, animals, manufactured products, merchandise and other commodities. During each of the 4 years immediately preceding June 30, 1913, mine products, consisting chiefly of bituminous coal used at the Ratcliff mill, exceeded the products of agriculture and animals combined; but the coal tonnage decreased from 6,886 tons in 1913 to 36 tons in 1918, and no coal moved in 1919, nor during the first five months of 1920. The greatest volume of agricultural products moved since 1909 was the 6,592 tons carried in 1914. This traffic has decreased to 2,072 tons in 1919,

and 1,038 tons was moved in the first 5 months of 1920. The tonnage of forest products from 1909 to 1917 ranged from 41,312 tons in 1915 to 66,936 tons in 1917. Only 25,738 tons of this traffic moved in 1918, 14,966 tons in 1919, and 9,958 tons in the first 5 months of 1920. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first 5 months of 1920. Exhibits offered showed a detailed statement of the freight tonnage handled by applicant from 1909 to 1920.

The income of the Eastern Texas shows a corresponding shrinkage since 1912 except for the year 1917. Applicant's gross income

for the year ended June 30, 1920, was \$34,210 and its net income \$24,494.21. The corresponding figures for 1917 were \$17,336.95 and \$6,391.57. Its operating expenses exceeded its operating revenues by \$9,639.66 in 1918, by \$4,086.15 in 1919, and by \$24,207.10 in the first 5 months of 1920. The total deficit incurred in 1918 was \$20,128.46, in 1919 it was \$49,362.64, and in January and February of 1920 it was \$10,181.27. The Eastern Texas was under Federal control during 1918, 1919, and the first 2 months of 1920, and its net corporate income was \$2,392.36 in 1918 and \$5,041.71 in 1919. There was a deficit of \$2,033.19 for March, 1920, \$4,455.54 for April 1920, \$11,703.96 for May, 1920, and applicant estimated its total deficit for the year would be \$68,824.68, exclusive of large expenditures necessary for maintenance of way to place the road in safe operating condition. Applicant's general balance sheet shows a credit balance of \$32,393.68 on May 1, 1920.

Applicant states it will furnish bond in the sum of \$100,000 for the cancellation of all of its outstanding obligations, and that the Southwestern will guarantee said bond and advance to applicant sufficient funds to pay or secure the payment of wages, accrued taxes, claims, loans, bills payable, and all other lawful obligations outstanding at the date of abandonment, if abandonment is authorized, 93 whether the indebtedness or obligation is or is not audited and reflected in applicant's account, and whether the claim has been or may later be presented.

Rates to and from Lufkin apply to and from Ratcliff and Kennard on interstate traffic, which comprises approximately 75 per cent of applicant's total tonnage. The divisions between the Eastern Texas and the Cotton Belt are said to be on a more liberal basis than is ordinarily allowed individual short line connections, and applicant contends that it would be impossible to increase its rates or divisions in amount sufficient to make its revenues meet its operating expenses. Its operating ratio was 440 per cent under the rates in effect immediately prior to the increases authorized in Increased Rates, 1920, 58 I. C. C. 220.

The Eastern Texas was originally well laid out from an engineering standpoint, the roadbed being generally level and the grades and curves short. The maximum gradient is slightly more than 1 per cent and the sharpest curve is about 4 degrees. The line was laid with 35-pound steel rails, which are not badly worn, but are both line and surface bent to such an extent that it is said trains cannot safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills, there are 50 bridges and trestles with a combined length of 8,862 feet, 94 which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition. Six bridges and trestles, with a combined length of 2,282 feet, are in need of immediate renewal to insure safe operation and all of the others require heavy repairs. Embankments and fills have fallen away, particularly at the bridge and trestle approaches, to such an extent that the ties are not properly

supported. The slopes of cuts and ditches have fallen in, damaging the draining so that, in many places, tires are covered with dirt. Applicant estimates that if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss.

The people of the community served by the Eastern Texas object to the granting of the certificate. It is shown that in case of abandonment of the road the nearest railway stations would be Crockett on the International & Great Northern Railway, about 17 miles from Kennard and 20 miles from Ratcliff, and Wells, Tex., on the Cotton Belt, about 20 miles northeast of Ratcliff. The public highways in this territory are not well improved. A fair, graded, clay-and-sand road extends from Ratcliff through Kennard to Crockett, but this road becomes soft during the rainy season. Another road not as good extends from Ratcliff through Sullivan Ferry to Wells. A road from Sullivan Ferry to Lufkin parallels the railroad for approximately 9 miles. Other roads extend from the general territory served by applicant to Morrell, Tex., and Alto, Tex., on the Cotton Belt and to Groveton, Tex., on the Groveton, Lufkin & Northern Railway. Livestock produced in the vicinity of

95 Ratcliff and Kennard hitherto has been driven to Crockett on account of better transportation facilities at that point. If the abandonment is permitted, it will be necessary to dray cotton and forest products a considerable distance to stations, but probably no further than some of the cotton produced in Texas is now hauled. Objectors testified as to the general conditions of the territory and the prospects for further increases in tonnage, but made no definite showing that within any reasonable time there would be sufficient tonnage to pay the operating expenses of the road. To meet their objections, applicant has offered to sell its line to any local interests for \$50,000.

Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of the applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of \$50,000. A certificate and order to that effect will be issued.

EXHIBIT "B."

Certificate of Public Convenience and Necessity.

At a Session of the Interstate Commerce Commission, Division 4,
Held at Its Office, in Washington, D. C., on the 2nd Day of De-
cember, A. D. 1920.

Finance Docket, No. 4.

In the Matter of Application of THE EASTERN TEXAS RAILROAD
COMPANY for a Certificate of Convenience and Necessity.

Application No. 1 Ab-1.

Be it known, that on the third day of June, 1920, the Eastern Texas Railroad Company, a carrier subject to the Interstate Commerce Act, filed with the Interstate Commerce Commission its application for a certificate of public convenience and necessity to abandon all of its lines of railway between Lufkin, Texas, and Kennard, Tex., situated in the Counties of Angelina, Trinity and Houston, in the State of Texas, pursuant to the provisions of paragraphs 18, 19, 20 and 21 of Section 1 of the Interstate Commerce Act:

That upon receipt of such application the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas and caused said notice to be published for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operates:

That after applicant had made due return to the questionnaire showing the facts and circumstances with respect to such proposed abandonment; and after due notice to all parties in interest, a hearing was held on said application on the 19th day of July, 1920, at

Austin, Tex., and on the 26th day of July, 1920, at Ratchell,
97 Tex., at which all parties in interest were given opportunity
to appear and be heard in the premises:

That after said case was submitted, representations were made to the Commission by the Legislature of Texas by a joint resolution with respect to the jurisdiction of this Commission in these proceedings:

That on the 2nd day of December, 1920, the Commission, by Division 4, made and filed a report containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof:

Now, therefore, upon the record in this proceeding,

The Interstate Commerce Commission hereby certifies, that the present public convenience and necessity permit of the abandonment of all of the lines of railroad of the Eastern Texas Railroad Company as follows, to wit:

Between Lufkin, Tex., and Kennard, Tex., through the counties of Angelina, Trinity and Houston, in the State of Texas;

It is therefore ordered, That the Eastern Texas Railroad Company be, and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated;

Provided, however, That the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed \$50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad;

Provided, further, That the Eastern Texas Railroad Company, be, and it is hereby, required to furnish to the Interstate Commerce Commission a good and sufficient bond secured by the St. Louis

98 Southwestern Railway Company in the penal sum of \$100,000, to be approved by the Secretary of the Interstate Commerce Commission, conditioned on the understanding that the said Eastern Texas Railroad Company will, before the expiration of one year after the date of this certificate, adjust, settle and pay all outstanding debts, obligations, judgments, liens, or mortgages, together with all taxes and assessments, Federal, state or municipal, due or to become due, and all claims or judgments for damages to persons or property.

Provided, further, That before suspending operation of said railroad or of any service now being rendered thereon, said Eastern Texas Railroad Company shall give at least thirty days' notice to the public of the date at which such service will be discontinued, said notice to be posted in a conspicuous manner in each station on said line of railroad; and

Provided, further, That the Eastern Texas Railroad Company, when making application for cancellation of tariffs, shall refer to this certificate by title, date and docket number.

By the Commission, Division 4.

[SEAL.]

GEORGE B. McGINTY,

Secretary.

A true copy of the original. I certify,

[SEAL.]

D. H. HART,

Clerk.

By A. B. COFFEE,

Deputy.

(Endorsed:) Filed April 4, 1921. D. H. Hart, Clerk, by A. B. Coffee, Deputy.

March 17,

DUVAL WEST

The matter before the Court, as I understand it, is limited to the case of the State of Texas against the Eastern Texas Railroad Company, number 323 on the docket. The question of consolidation of the companion case instituted by the Railroad Company is not before the Court. The order issued would be limited to the action brought by the State of Texas against the Eastern Texas Railroad. It is in that case that the motion is made to dissolve the injunction originally issued by Judge Calhoun in the State Court. The case having been subsequently removed to the Federal Court at the instance of the Railroad Company Judge Calhoun's temporary injunction because the order of this Court. No motion to remand was made, as I understand it in this case, and no motion to remand having been made I assume that the case has been properly removed and that it stands regularly upon the docket.

The two main issues of law presented by the motion to dissolve are:

First. That the Interstate Commerce Commission's acts in attempting to exercise the functions and duties imposed upon it by the Transportation Act,—and in that Section which authorized the Interstate Commerce Commission to take cognizance of applications for the dismantling and abandonment of railroad properties,—are unconstitutional because Congress, in passing that law, conferred power, or attempted to confer power and authority upon the Interstate Commerce Commission that was not within the contemplation, or the meaning or interpretation, of the original Constitutional Enactment which conferred upon Congress the power to pass laws to regulate commerce among the several states. That is to say, to abandon a railroad and dismantle it is not a regulation of commerce among the States, and unless that Act is within the meaning of those words, then Congress has attempted to do something that it had no power to do, consequently the Section is unconstitutional. Obviously if the statute is unconstitutional, the action taken by the Interstate Commerce Commission, under and by virtue of that Section that attempts to give it that power, would be wholly void, the same as if nothing had been done. It seems to me, looking to the pleadings in the case, that the Court can entertain jurisdiction, and to determine the Constitutional questions.

The second question, — assuming that the Court has jurisdiction and that the Statute in question is constitutional—is whether the state should not have followed, for its remedy, the procedure specified in one of the Sections of the Act which shows how and in what manner any action by the Interstate Commerce Commission on this particular question may be objected to, and how any rights invaded by reason of it may be saved and preserved as therein set out. This will be referred to later.

On the question of the constitutionality of this Section of the Interstate Commerce Commission Act the Court has not been especially

enlightened or aided by the authorities that have been presented because this is a case of first impression, the Court being called upon to fix a definite meaning of the right to "abandon property in the light of the Constitutional reservation of the National right to 'regulate.'" Counsel, however, have furnished all the authorities there are that bear upon the law of the motion. Being a case of first impression upon the specific point, the Court is obliged to base its ruling upon a reason, and the weight and trend of authorities in general. The history of the interpretation of the Interstate Commerce provision of the Constitution indicates that the power reserved to the Nation by the Constitution lay for a long time dormant. There was hardly

any exercise of that power, and it was many years after the 101 adoption of the Constitution before our necessities required it.

Subsequently, by reason of the increase of population, the necessity for intercommunication, and for countless other reasons, the states have become more dependent upon commerce among one another. The principle of State Sovereignty and the rights which were most zealously guarded by each state have, by force of circumstances, and by the inexorable logic of events, and the times, and of necessity, been practically swept away. The old principle of States' rights considered from the standpoint of today have become merely a sentiment. The trend of authority expressed in the decisions of the Supreme Court of the United States, and by Congress in its Acts, indicates the purpose to extend that power whenever necessary to regulate commerce among the states. The Congress puts the breath of life into interstate commerce and under the authority to regulate extends that power over functions that had theretofore been exercised by the states. Each normal person has a deep and lasting feeling of pride for his native state. Instinctively people are patriotic and loyal, consequently when these Acts of Congress were passed the people of the different states felt that Congress was exercising powers that were attributes of States' sovereignty and not included in the constitutional provisions. The fight between the Nation on the one hand and the states on the other hand has been active, continuous, and persistent for the last forty years. The Act which this Court is called on to interpret is now being considered by the Supreme Court of the United States. There are assembled forty-two states on the one side and the National Government on the other. The states are there contending, as the State of Texas is contending

here, that the Congress has exceeded the constitutional limit 102 in attempting by the Transportation Act of 1920 to confer

upon the Interstate Commerce Commission the right of supervision over all property and franchises held by the railroad companies, whether of interstate or intrastate, and in disregard of the rights of the several states. The principles involved in the case before me I believe are the same principles that are now under consideration by the Supreme Court of the United States. It, therefore, seems a waste of effort, a waste of time, and a waste of money for this Court at this time to obtrude its views by an attempt at decision of the great questions. This Court will be deciding nothing, because the Great Court will be speaking finally in a few weeks. Any ex-

tended discussion of the law is useless. Certain "rules" control the trial Court; these are expressed in the Constitution, the Treaties, the Acts of Congress, as interpreted by the National Courts on the one side, and by the Constitution and Acts of the Legislature of the several states, and the mass of judicial interpretative precedents. It is my opinion that the trend of authority, the trend of National Legislation, the preponderance of authority, and of reason, impels the conclusion that this Transportation Act is constitutional. That the forty-two states stand as appellants before the Supreme Court carries the presumption that inferior courts of nisi prius and appeal are holding the view that the Act in question is constitutional. The Court has given dire consideration to the various propositions of law presented and carefully estimated the force and effect of the various decisions of the courts bearing thereon. Particularly has the reasoning of the courts upon which precedents are founded appealed to the Court. There are few, if any, instances where Congress has

extended the power of regulation of interstate commerce that 103 have failed to be upheld as Constitutional.

The Supreme Court will in all probability hold that the provisions of Congress, conferring power and authority upon the Interstate Commerce Commission to say when railroads shall be extended, or built, or, conversely, when they are to be abandoned, are constitutional, and will be determined to be a regulation of commerce among the states; so believing this Court will so hold.

It may be, perhaps, unnecessary to pass upon the second ground, that is, whether or not the State of Texas has pursued the proper remedy in this case. If the Act is constitutional, then the provisions of the Act, when complied with, necessarily conveys the idea that when those things are performed they are rightfully and lawfully performed. The Court, therefore, holds that if any rights are accorded the interested parties under the Interstate Commerce Commission Act, or any remedies afforded to them thereby, the remedies prescribed by the Act should be followed. Probably the course that the state should have pursued in the matter, assuming the Act to be constitutional, would be to have failed its suit in the Division of the Federal Judicial District where the property is situated, and the Judge there call to his assistance a sufficient court of three Judges, as prescribed by the Statute.

The motion ought to be sustained. The order of the Court will be that the injunction heretofore issued in the state court will be dissolved. I will hear any suggestion by the parties as to the form of the order.

Endorsed—Filed April 4, 1921. D. H. Hart, Clerk, by A. B. Coffee, deputy.

104 In the United States District Court for the Western District
of Texas, Austin Division.

No. 323, Equity.

THE STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY.

Order.

This case coming on to be heard upon the defendants' motion to dissolve the injunction issued by the Honorable George Calhoun, Judge of the District Court of the State of Texas, in and for the Fifty Third Judicial District of Texas, at Austin, Travis County, on the 9th day of July, 1920, and the Court having heard said motion and examined the pleadings of both parties herein filed, heard the evidence offered on said motion and argument of counsel, it is the opinion of the Court that the law is for the defendants and that said motion ought to be sustained.

It is therefore ordered, adjudged and decreed by the Court that the said injunction issued by the Honorable George Calhoun on the 9th day of July, 1920, as aforesaid, be and the same is hereby dissolved, set aside and held for naught, and that the defendants, the Eastern Texas Railroad Company, J. M. Herbert, F. W. Green, E. B. Perkins, Daniel Upthegrove and E. J. Mantooh, recover of the plaintiff, the State of Texas, their costs in that behalf incurred.

Whereupon, this cause coming on for final hearing on the merits thereof, and the Court having heard the pleadings, the evidence and argument of counsel, it is the opinion of the Court that the law is for the defendants and that they are entitled to recover judgment of and from the plaintiff.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff take nothing by its suit and that the defendants, the Eastern Texas Railroad Company, J. M. Herbert, F. W. Green, E. B. Perkins, Daniel Upthegrove and E. J. Mantooh, do have and recover judgment of and from the plaintiff, the State of Texas, and that each of said defendants go hence without day and recover of and from the plaintiff, the State of Texas, all costs in this behalf expended, for which they may have their execution.

Done at San Antonio this March 17th, 1921.

(Sgd.)

DUVAL WEST,

Judge.

To which said judgment the plaintiffs then and there in open court excepted.

[Endorsed:] No. 323, Equity. The State of Texas v. Eastern Texas Railroad Co. United States District Court, Western District

of Texas, Austin Division. Judgment. Entered Equity Journal E—Page 232. Filed Mar. 17, 1921. D. H. Hart, Clerk, by T. H. Thompson, Deputy.

105 In the United States District Court, Western District of Texas,
Austin Division.

In Equity.

STATE OF TEXAS

v.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
DANIEL UPTHEGROVE, and E. J. MANTOOTH.

Petition for or Claim of Appeal.

To the Honorable Court of the United States for the Western District
of Texas:

Now comes the plaintiff herein, by C. M. Cureton, Attorney General of the State of Texas, Bruce W. Bryant, Tom L. Beauchamp and Wallace Hawkins, its solicitor, and says that plaintiff is aggrieved by the order of this Honorable Court entered on the 17th day of March, 1921, in the above cause, by which order the temporary injunction restraining the defendants herein from abandoning the Eastern Texas railroad and ceasing and discontinuing the operation of said railroad or any part thereof for the transportation of passengers and freight in interstate commerce was dissolved, in that plaintiff is denied the right to effectively enforce the statutes of the State of Texas regulating, controlling and governing the abandonment of the operation and dismantling of physical properties of intrastate railways, and to force the Eastern Texas Railroad

106 to comply with its charter contract and the pre-existing laws of the State of Texas by which it is compelled to operate its trains until November 1st, 1925.

Further the plaintiff herein is aggrieved by the judgment of this Honorable Court denying the plaintiff the remedies sought in its petition and giving judgment for the defendant herein, and plaintiff claims an appeal therefrom and prays that the same may be allowed by an order of this Honorable Court, and that the record may be duly certified and forwarded to the Supreme Court of the United States in order to perfect said appeal.

C. M. CURETON,

Attorney General;

BRUCE W. BRYANT,

TOM L. BEAUCHAMP,

WALACE HAWKINS,

Assistant Attorneys General,

Solicitors for Plaintiff.

Endorsed: In the United States District Court, Western District of Texas—Claim for Appeal—State of Texas v. Eastern Texas Railroad Company et al. In Equity. Filed April 2, 1921. D. H. Hart, District Clerk, by A. B. Coffee, Deputy.

107 In the United States District Court, Western District of Texas,
Austin Division.

In Equity.

STATE OF TEXAS

v.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
DANIEL UPTHEGROVE, and E. J. MANTOOTH.

Assignment of Error.

Now comes the plaintiff in the above entitled cause and files the following assignments of error upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the order dissolving temporary injunction and from the judgment made herein by this Honorable Court on the 17th day of March, 1921.

1.

That there is manifest error on the face of the record in the above entitled cause in that the Court erred in considering and in giving force and effect to the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission on December 2, 1920 "in the matter of application of the Eastern Texas Railroad Company for a Certificate of Convenience and Necessity, Finance Docket No. 4, Application No. 1, A b-1."

2.

That the Court erred in its ruling denying and refusing plaintiff the right and opportunity of introducing testimony as shown in the record, showing and tending to show that the findings of the Interstate Commerce Commission in Finance Docket No. 4 were untrue, and that such order of said commission was arbitrary, unreasonable and unjust and without evidence to support it, and contrary to law and the evidence.

3.

That the Court erred in its holding that subdivision 18, 19, 20, 21 of Section 1 of the Interstate Commerce Commission Act as amended February 28, 1920, were constitutional and that the law is for defendants in said cause.

4.

That the Court erred in holding that the proper interpretation of subdivisions 18, 19, 20, 21 of Section 1 of the Interstate Commerce Commission as amended February 28, 1920, grants to the Interstate Commerce Commission authority to order the Eastern Texas Railroad Company to abandon operation and dismantle its property contrary to the laws of Texas and contrary to its charter contract.

Wherefore appellants pray that said decree be reversed and that said District Court for the Western District of Texas be ordered to enter a decree reversing its order dissolving the injunction and its decision that the law is for the defendant in said cause.

C. M. CURETON,

Attorney General;

BRUCE W. BRAYNT,

TOM L. BEAUCHAMP,

WALACE HAWKINS,

Assistant Attorneys General,

Solicitors for Plaintiff.

Endorsed: Assignments of Error. State of Texas v. Eastern Texas Railroad Co. et al. In Equity No. 323. Filed Apr. 2, 1921. D. H. Hart, District Clerk. By A. B. Coffee, Deputy.

109 In the United States District Court, Western District of Texas, Austin Division.

In Equity.

STATE OF TEXAS

v.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
Daniel Upthegrove, and E. J. Mantooth.

Order Allowing Appeal.

At a session of said court held at 10 o'clock in the Federal Building in the City of San Antonio, Texas, on the 2 day of April, 1921.

Present, Hon. Duval West, District Judge.

On reading and filing in the above entitled cause the petition of defendants for an appeal to the Supreme Court of the United States it appearing to the court that the plaintiffs have filed their assignments of error and claim of appeal as required by the rules of the Supreme Court of the United States, it is

Ordered that an appeal be and the same is hereby allowed as prayed for from the order made on the 17th day of March, A. D. 1921, granting a dissolution of injunction as prayed for by defend-

110 ants and also appeal is allowed from judgment for defendants in this cause.

DUVAL WEST,
District Judge.

Endorsed. Filed April 2, 1921. D. H. Hart, Clerk, By A. B. Coffee, Deputy.

111 THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

The President of the United States to Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, Appellees, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Texas, in the cause wherein The State of Texas is appellant and Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, are appellees, to show cause, if any there be, why the decree rendered against the said The State of Texas, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 2nd day of April in the year of our Lord one thousand nine hundred and twenty one.

Signed this, the 2nd day of April, 1921.

[The Seal of the U. S. District Court, Western Dist. Texas,
Austin.]

DUVAL WEST,
United States Judge.

[Endorsed] No. 323 Eq. The State of Texas vs. Eastern Texas Railroad Co., et al. Citation. Marshal's Return. Service of this Citation is hereby accepted this April 2, 1921. E. B. Perkins, Daniel Upthegrove, E. J. Mantooth, Solicitors for Appellees. Filed April 1, 1921. D. H. Hart, Clerk, By A. B. Coffee, Deputy.

112 In the United States District Court, Western District of Texas, Austin Division.

In Equity.

No. 323.

STATE OF TEXAS

v.

EASTERN TEXAS RAILROAD COMPANY, E. B. PERKINS, F. W. GREEN,
Daniel Upthegrove, and E. J. Mantooth.

Stipulation.

For the purpose of reducing the size of transcript of the record in the above entitled cause on appeal from the order dissolving the temporary injunction made on the 17th day of March, 1921, and from the judgment of the court denying plaintiff relief and remedy sought in its petition, it is stipulated between the parties herein by their respective solicitors that the transcript of the record on such appeal shall embody the following portions and no other portions of the record in the above entitled cause:

1.

Bill of complaint filed in the 53rd District Court of Travis County, Texas, on July 9th, A. D., 1920, and supplemental bill of complaint or petition filed the 14th day of January, A. D., 1921 in the District Court of the United States for the Western District of Texas.

2.

Defendant's answer to the bill of complaint filed the 15th day of November, A. D. 1920, and supplemental answer filed December 18, A. D. 1920.

3.

Defendant's application and bond for removal from the State Court to the Federal District Court for the Western District of Texas, and the order granting such removal.

4.

The order of temporary injunction granted in the State Court July 9, 1920.

5.

Defendant's motion to dissolve the temporary injunction and supplemental motion filed December 18, 1920, and March 14, 1921, respectively.

6.

Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission of date December 2, 1920, "In the Matter of Application of the Eastern Texas Railroad Company for a Certificate of Convenience and Necessity, Finance Docker No. 4, Application No. 1AB —1."

7.

The court's conclusions of law upon which judgment was entered.

8.

Order of the court entered March 17 dissolving the temporary writ of injunction; and order giving judgment to defendant in the cause.

9.

Plaintiff's claim of appeal.

10.

Plaintiff's assignments of error.

114

11.

Order allowing appeal.

12.

Citation on appeal and acceptance of service.

13.

This præcipe and stipulation.

14.

Statement of evidence.

C. M. CURETON,
Attorney General.
TOM L. BEAUCHAMP.
WALACE HAWKINS.
BRUCE W. BRYANT.
Assistant Attorneys General.
Solicitors for Plaintiffs.
E. B. PERKINS.
DANIEL UPTHEGROVE.
E. J. MANTOOTH,
Solicitors for Defendants.

Endorsed: Stipulation for Appeal Record—State of Texas vs. Eastern Texas Railroad Co. et al. In Equity No. 323. Filed April 4, 1921. D. H. Hart, District Clerk, by A. B. Coffee, Deputy.

115 In the United States District Court, Western District of Texas, Austin Division.

No. 323, Equity.

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY et al.

Statement of Evidence.

It is hereby agreed by and between the State of Texas, plaintiff, by and through the Attorney General, C. M. Cureton, and Bruce W. Bryant, Tom L. Beauchamp, and Wallace Hawkins, Solicitors for the State of Texas, and the Eastern Texas Railroad Company et al., defendants, through E. B. Perkins, Daniel Upthegrove, and E. J. Mantooth, Solicitors for defendants, that on the hearing of this cause it was agreed and stipulated in open court that, first, the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission in Finance Docket No. 4, Application No. 1Ab1, dated December 2nd, 1920, copy of which is attached as an exhibit to the defendants' supplemental answer filed herein, shall be considered in evidence and the same is here referred to to the same extent and force and effect as if copied in full herein and that all of the conditions contained in said Certificate of Public Convenience and Necessity, which conditions are as follows, to wit:

"Provided, however, that the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed \$50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad;

"Provided, further. That the Eastern Texas Railroad Company be and it is hereby, required to furnish to the Interstate Commerce Commission a good and sufficient bond secured by the St. Louis Southwestern Railway Company in the penal sum of \$100,000, to be

116 approved by the Secretary of the Interstate Commerce Commission, conditioned on the understanding that the said Eastern

Texas Railroad Company will, before the expiration of one year after the date of this certificate, adjust, settle and pay all outstanding debts, obligations, judgments, liens or mortgages, together with all taxes and assessments, Federal, state or municipal, due or to become due, and all claims or judgments for damages to persons or property.

"Provided, further, That before suspending operation of said railroad or of any service now being rendered thereon, said Eastern Texas Railroad Company shall give at least thirty days' notice to the public of the date at which such service will be discontinued, said notice to be posted in a conspicuous manner in each station on said line of railroad."

have, in whole and in all of its parts, been complied with by the Eastern Texas Railroad Company, and that said conditions have been entirely and completely satisfied, except that the thirty full days' notice to the public of abandoning operation of said railroad has not yet been completed, but is now being given for the abandonment of the operation of said railroad, at 12:01 a. m. May 1st, 1921.

Witness our hands this 2nd day of April, 1921.

C. M. CURETON,

Attorney General;

TOM L. BEAUCHAMP,

BRUCE W. BRYANT,

WALACE HAWKINS,

Assistant Attorneys General,

Solicitors for Plaintiff, State of Texas.

E. B. PERKINS,

DANIEL UPTHEGROVE,

E. J. MANTOOTH,

Solicitors for Defendants,

Eastern Texas Railroad Company et al.

Endorsed: In United States District Court, for Western District of Texas, Austin Division. Equity No. 323, State of Texas v. Eastern Texas Railroad Company et al.—Agreement and Stipulation as to publication of notice and offer of sale as conditions in Certificate of Public Convenience issued by the Interstate Commerce Commission in Finance Docket No. 4. Filed April 4, 1921. D. H. Hart, Clerk, by A. B. Coffee, Deputy.

THE UNITED STATES OF AMERICA,
Western District of Texas:

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the foregoing, on pages numbered 1 to 116, inclusive, contain a true and correct transcript of the proceedings had and orders entered as therein stated, except that the original citation instead of a copy thereof, is included on page 111 in cause No. 323, Equity, styled The State of Texas, vs. Eastern Texas Railroad Company et al, embraced in the Transcript of said Court issued on the removal of the cause in the State Court to this Court, as the same appear on file and of record in this office, and

I do further certify that the foregoing record embraces only such pleadings and orders as are specified in the preeipe filed by appellant and agreed to by appellees.

Witness my official signature and the seal of said District Court, at office in the City of Austin, Texas, the 5 day of April, 1921.

[The seal of the U. S. District Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk,
By A. B. COFFEE,
Deputy.

Endorsed on cover: File No. 28,227. W. Texas D. C. U. S. Term No. 870. The State of Texas, appellant, vs. Eastern Texas Railroad Company et al. Filed April 13th, 1921. File No. 28,227.

(3750)

Office Supreme Court,
U.S.
FILED

APR 18 1921

JAMES D. MARSHALL

CL.

No. 8 **298**

IN THE

Supreme Court of the United States

APRIL TERM, 1921

THE STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS FROM AN
ORDER DISSOLVING A TEMPORARY
INJUNCTION.

APPLICATION FOR SUPERSEDEAS, OR AN
ORDER SUSPENDING THE DECREE DIS-
SOLVING THE TEMPORARY INJUNC-
TION TO MAINTAIN THE STATUS
QUO PENDING THE APPEAL.

C. M. CURETON, *Attorney General*,
BRUCE W. BRYANT,
WALACE E. HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorney Generals,
Solicitors for Appellant.



IN THE

Supreme Court of the United States

APRIL TERM, 1921

THE STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS FROM AN
ORDER DISSOLVING A TEMPORARY
INJUNCTION.

Now comes the State of Texas, a Sovereign State of the Union, acting by and through its duly elected, qualified and acting Attorney General, C. M. Cureton, appellant, and makes application for an order suspending the decree of the United States District Court for the Western District of Texas dissolving the restraining order theretofore granted by the Hon. George Calhoun, Judge of the 53rd Judicial District Court of the State of Texas, dated the 9th day of July, A. D. 1920, while said cause was pending in said court and prior to its removal to the Federal District Court for the Western District of Texas by order entered on the 19th day of October, 1920, or a temporary injunction, to preserve the status quo pending this appeal and, in support thereof, states the following reasons and facts:

(1) At the session of the legislature of the State of Texas of 1889 a law was passed prohibiting a railroad company within the State of Texas from abandoning the operation of trains when once said railroad had been incorporated, constructed, and permitted by the laws of Texas to operate trains as a common carrier and had done so; said law has been at all times, and is now in force in the State of Texas and has never been repealed.

(2) On the 8th day of November, 1900, the Eastern Texas Railroad Company filed its articles of association in the office of the Secretary of State of the State of Texas, and thereby and thereafter became a corporation under the laws of the State of Texas for the purpose of constructing, owning, maintaining and operating a railroad from the town of Lufkin, in Angelina County, State of Texas, to the city of Crockett, in Houston County, Texas. In said charter it was declared that the corporation should begin to exist on the 1st day of November, 1900, and continue as a corporation for a period of twenty-five years. Thereafter and during the year 1902 said corporation had completed the construction and begun the operation of trains on said line of railroad for a distance of thirty-one miles from the town of Lufkin to the town of Kennard, in Houston County, at which place it erected an office building and established its general offices and became in all respects a common carrier under the laws of the State of Texas, subject to the Constitution and Laws of the State, and compelled to operate trains in accordance therewith and in accordance with the provisions of its charter, which, upon the approval of the Secretary of State, when filed, became a charter contract between the said railroad company and the State of Texas.

(3) That on or about the 20th day of August, 1906, plaintiff sold its net current assets and its rolling stock to the Louisiana and Texas Lumber Company, and on Septem-

ber 1st, 1906, the St. Louis Southwestern Railway Company, a Missouri corporation, acquired the capital stock of the Eastern Texas Railroad Company and still owns the entire capital stock except four shares held by individuals for the purpose of qualifying them to act as directors; and that, thereupon and ever since, the Eastern Texas Railroad Company has been operated as a branch of the St. Louis Southwestern Railway Company of Texas, which is in fact owned by the St. Louis Southwestern Railway Company, a Missouri Corporation.

(4) That on the 3rd day of June, 1920, the Eastern Texas Railroad Company, acting in its corporate name, filed with the Interstate Commerce Commission at Washington, D. C., an application for a certificate of public convenience and necessity, praying that it be granted authority to abandon its said line of railway and the stations thereon and on the 2nd day of December, 1920, the Interstate Commerce Commission, upon its findings, entered an order directing the abandonment of said railroad's line of railway and stations thereon, in accordance with its application and upon certain conditions therein named but not material to this application.

(5) On the 9th day of July, 1920, prior to the order of the Interstate Commerce Commission granting the certificate of convenience and necessity to the Eastern Texas Railway Company, the State of Texas filed suit in the District Court of the 53d Judicial District of the State of Texas and applied for an injunction restraining the Eastern Texas Railroad Company and E. B. Perkins, F. W. Green, Daniel Upthegrove, and E. J. Mantooth, from abandoning the operating of trains on said line of railroad or any part thereof for transportation of passengers and freight in intrastate commerce, and dismantling same, and seeking a temporary injunction to this effect and praying that same be made permanent upon the hearing of said cause.

(6) That on the 9th day of July, 1920, a temporary injunction was granted by Hon. George Calhoun, Judge of the 53rd Judicial District Court of the State of Texas restraining the defendants in said cause named in accordance with the prayer of the State of Texas herein above alleged, which said restraining order was duly issued by the Clerk of the Court on the 9th day of July, 1920, and in proper time duly served on each of the parties named.

(7) Upon the application of the defendants in said suit Hon. George Calhoun, Judge, did on the 19th day of October, 1920, enter an order removing said cause to the Federal Court for the Western District of Texas.

(8) On the 15th day of March, 1921, the case of the State of Texas vs. Eastern Texas Railway Company, et al., being the cause on appeal, came on to be heard before the Hon. DuVall West, Judge of the Federal District Court for the Western District of Texas at San Antonio, Texas, and thereupon the Eastern Texas Railroad Company filed its motion to dissolve the injunction theretofore granted in said cause alleging in substance that the matters and things which it had been restrained from doing were matters and things authorized to be done by the Constitution and laws of the United States and were lawful and could not be lawfully restrained by a writ of injunction from the District Court of the State of Texas nor by writ of injunction from the Federal District Court for the Western District of Texas; that the Constitution of the United States authorized Congress to pass all laws necessary to carry into effect the provisions of the Constitution authorizing them to regulate commerce and that by the enactment of the Transportation Act of 1920, Congress had conferred upon the Interstate Commerce Commission full power and authority to issue to the Eastern Texas Railroad Company a certificate of public convenience and necessity, empowering and authorizing said railroad company to abandon the operation

of its line of railway and take up and remove its tracks, structures and property constituting same, and to make lawful disposition thereof or dispose of the same either in whole or in part; and that, upon application of the Eastern Texas Railroad Company, the Interstate Commerce Commission had made, under the provisions of said Transportation Act, an order so authorizing the Eastern Texas Railroad Company to so abandon operation of its line of railway and take up and remove the tracks, structures, and property constituting same and to dispose of same, by order dated December 2, 1920, and that because of said order all legal questions had been foreclosed and the District Court for the Western District of Texas could not hear and determine the matters attempted to be raised by the pleadings of the State of Texas.

(9) Upon the hearing of the motion to dissolve, the Hon. DuVall West, Judge of the District Court for the Western District of Texas, did on the 17th day of March, 1921, enter his order dissolving the writ of injunction, holding that the certificate of convenience and necessity issued by the Interstate Commerce Commission precluded further litigation and declining to hear testimony in said cause.

(10) The appellee, the Eastern Texas Railroad Company, has never made application to the State of Texas nor to the legislature of the State of Texas asking for a permit or a special act to permit it to abandon the operation of its trains and dismantle its road, and none has been granted.

(11) The Eastern Texas Railroad Company had received donations of right-of-way when its line of railway was constructed and sold to purchasers the town lots in the town of Kennard and established said town, and the purchasers who bought same built homes, business houses, and shops of a permanent nature and have continued to make their homes in said town.

(12) In the pleadings of the State of Texas it was denied that the Eastern Texas Railroad Company had not made money in its operation, and the State alleged that if it were losing money it was only temporary and that conditions existed and the prospects were that the said railroad would be on a paying basis within a short period of time if it were not then doing so. Proof was offered to the court in substantiation of this, but was refused as is shown by the records of the appeal in this case, because the Court held that the order of the Interstate Commerce Commission foreclosed further litigation of the matter.

(13) It is further alleged by the State of Texas that the St. Louis Southwestern Railway Company had absorbed all of the stock of the Eastern Texas Railroad Company in 1906, and had ever since and still owns all of the same except the qualifying shares held by directors; that the St. Louis Southwestern Railway Company of Texas operates the Eastern Texas Railroad as a part of its system of approximately 800 miles in the State of Texas and of 1,700 miles within the United States owned by the St. Louis Southwestern Railway Company, a Missouri corporation. That their officers are identical except a few directors; that the superintendent of operation is the same person as the superintendent of the St. Louis Southwestern Railway Company of Texas as well as the Auditor, Treasurer, and General Manager and that all of its business is carried on and operated by the St. Louis Southwestern Railway Company of Texas. This pleading is in accordance with the finding of the Interstate Commerce Commission and is not denied by the Eastern Texas Railroad Company, but such finding is attached to its pleading in another suit filed, styled "Eastern Texas Railroad Company vs. Railroad Commission of Texas, et al," and is admitted to be a fact. The State of Texas alleged in its pleading that the Inter-

state Commerce Commission had no authority under the law to authorize a railroad to abandon a part of its line of railway without a showing that its entire system is losing money, and that the abandonment of the portion authorized would relieve its distressed condition.

(14) No pleadings in the case alleged and no effort was made to show before the Interstate Commerce Commission that the St. Louis Southwestern Railway Company was losing money and that the abandonment of the line known as the Eastern Texas Railroad Company would relieve the distressed corporation.

(15) The Eastern Texas Railroad Company is now proceeding in accordance with the certificate of convenience and necessity issued to it by the Interstate Commerce Commission and has given notice that it will on the 1st day of May, 1921, cease operation of its trains and proceed to carry into effect and exercise the privileges granted to it by said certificate.

(16) If permitted to do so, and unless restrained by order of this court to which an appeal has been duly taken by the State of Texas and allowed by the Hon. DuVall West, Judge of the Federal District for the Western District of Texas and which cause has been docketed by the Clerk of this court, the appellees will proceed to abandon operation of its trains and to dismantle and dispose of its railway and physical properties and thereby destroy the subject matter of this litigation before the final determination of the matter in controversy and defeat the right of the State of Texas to appeal the said cause to the Supreme Court of the United States and there have determined the constitutionality of the Act of the State of Texas compelling railroads subsequently chartered to operate its trains and carry on intrastate commerce within the State of Texas until permitted by the State of Texas to abandon same and to deter-

mine if the Act of Congress known as the Transportation Act of 1920, in so far as it seeks to control the physical property of a railroad wholly within a State, is Constitutional and does by its terms grant to the Interstate Commerce Commission authority to order the abandonment of line of railway chartered by State contrary to its charter contract and pre-existing laws of the State, said road being situated wholly within the State, and whether or not it has authority to authorize a railroad to abandon a part of its line of railway in the absence of a showing that the entire system is losing money. The State of Texas has no other means or remedy of compelling appellees to preserve the property and keep themselves in a position to abide the final decree and judgment of this Court, and if this supersedeas or order suspending the decree dissolving the restraining order or temporary injunction be not granted, the question presented in the appeal will become a moot question and the jurisdiction of this court thereby destroyed.

(17) The statements made in this application are from the pleadings and are admitted unless and except in the instances indicated by the wording hereof.

WHEREFORE, The appellant prays this Court to grant a proper order suspending, pending appeal, the judgment and decree appealed from in so far as it dissolve the restraining order heretofore issued, and in so far as same would authorize the Eastern Texas Railroad Company to dismantle its line of railway and dispose of all or any part of its physical property, or, in the alternative, to grant a temporary injunction pending the appeal, issuing out of this court in terms of the restraining order granted below to the end and effect that appellees shall not be permitted to destroy or dispose of its physical properties or do anything that will preclude it from answering the judgment of this court and resuming operation of trains on its line of railway should

the final order of this court compel it to do so, or to make such other order as will afford the appellant protection pending the appeal.

THE STATE OF TEXAS,
By C. M. CURETON, *Attorney General*,
BRUCE W. BRYANT,
WALACE E. HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorney Generals,
Solicitors for Appellant.

THE DISTRICT }
OF COLUMBIA } *ss.*

Tom L. Beauchamp, being duly sworn deposes and says that he is one of the solicitors for the appellant named in the foregoing motion and is familiar with the facts therein set forth; and affiant further states that the facts stated in the foregoing application are true as therein stated.

.....
Subscribed and sworn to before me, on this —— day
of April, A. D. 1921.

.....
Service of the foregoing application is acknowledged on
this —— day of April, A. D. 1921.

.....
Solicitor for Appellees.



Office Supreme Court
FILED
APR 18 1921
JAMES D. MAHAN

No. 870 **298**

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS FROM AN
ORDER DISSOLVING A TEMPORARY
INJUNCTION

BRIEF AND ARGUMENT

UPON APPELLANT'S APPLICATION FOR SUPER-
SEDEAS, OR AN ORDER SUSPENDING THE
DECREE DISSOLVING THE TEMPORARY
INJUNCTION TO MAINTAIN THE
STATUS QUO PENDING THE
APPEAL

C. M. CURETON, *Attorney General*,
BRUCE W. BRYANT,
WALACE E. HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorney Generals,
Solicitors for Appellant.



IN THE
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OCTOBER TERM, 1920

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APPEAL

1. The pre-existing statute of the State of Texas forbidding abandonment of a railroad and its application to the Eastern Texas Railroad is admitted by appellees. That it became a part of its charter contract has often been held

by this court. That it is binding even when the railroad is losing money has never been specifically determined, but such is strongly intimated in the case of Brooks-Scanlon Company vs. Railroad Commission, 251, U.S. Report, page 369, and in the recent case from Florida, not yet reported in bound volume, but referred to as the Bullock Case. Also in the case of Missouri Pacific Railroad Company vs. Kansas, 216 U.S. 262, it is asserted that the State has the right to control the physical properties of a railroad so long as it does not interfere with interstate commerce. The Transportation Act of 1920 gives no new grounds upon which a railroad may abandon operations but only a new procedure, designed for the purpose of protecting interstate commerce, and gives to the Interstate Commerce Commission authority to refuse it in the event such abandonment would work an injury to interstate commerce. The right of the State is recognized and the wording of the Act, compared with the wording of the same Act with reference to rates and to the issuance of securities, shows clearly Congress did not attempt to grant such authority contrary to the laws of a State. With reference to the fixing of rates, Section 13 (4) says in part:

“* * * Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, *the law of any State or the decision or order of any State authority to the contrary notwithstanding.*”

Similar language is used with reference to securities but no such inhibition is placed against a State exercising its powers under its laws with reference to abandonment of railroads. We contend, therefore, that the adjective and not the substantive law is changed by the Act, and no denial

of the State's power to control the physical properties is contained in the act. And that, as formerly, all pre-existing laws enter into the charter contract and are not nullified as claimed by appellees.

2. Whether or not the Eastern Texas Railroad is a part of the system of the St. Louis Southwestern is a question of law for this court to determine. The facts are undenied. It cannot be denied that, if it is, the order of the Interstate Commerce Commission, denominated a certificate of convenience and necessity, is void for want of authority of law. Upon this question the court below refused to hear testimony. In its finding, attached as "Exhibit A" to appellee's answer to the Motion for Injunction, the Interstate Commerce Commission said:

"On September 1, 1906, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, * * * which except for the director's qualifying shares still holds it. There is substantial identity between the officers of the Eastern Texas and the Southwestern."

Authority.

Chicago, Milwaukee & St. Paul Railway Co. et al.
vs.
Minneapolis Civic and Commerce Association,
247 U. S. Reports, page 490.

3. This suit originated in the State court prior to the order of the Interstate Commerce Commission. It is not a suit brought either to enforce or set aside an order of the Interstate Commerce Commission. It had been removed to the Federal Court and was there pending on substantial issues at the time the certificate of convenience and necessity was issued. The court had jurisdiction and so held. He, therefore, had jurisdiction to hear and determine all matters in controversy. Defendants then pleaded the order

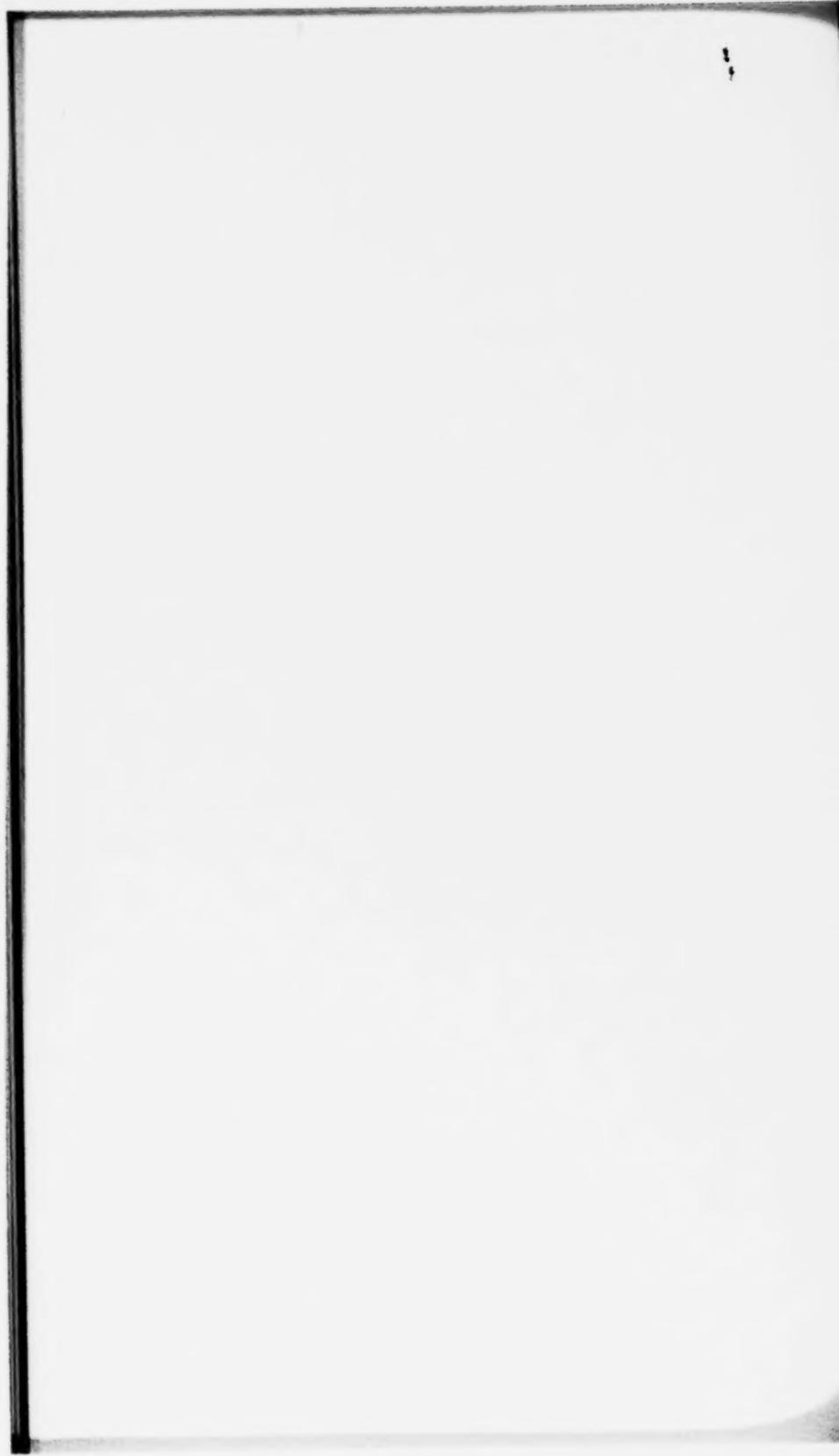
of the Interstate Commerce Commission. If the order of the Interstate Commerce Commission and its validity became an issue, the court had a right to determine this along with other questions. This court has such jurisdiction and the appellees should not be permitted to destroy the subject matter of the litigation during the pendency of this appeal.

4. Under the laws of the State of Texas, it cannot become the principal or surety on any bond. In no way would a bond bind it in damages. It cannot, therefore, offer to make bond to secure appellees against damage by reason of an injunction issued by this court. No bond has been required of it on this appeal. For that reason we do not ask an injunction or order compelling appellees to operate trains and otherwise incur expense, but merely to prohibit it from removing its tracks and disposing of its properties during the pendency of the appeal. It owns no rolling stock except one combination passenger and express car. It has shown no way by which it would be damaged if this injunction or restraining order be granted and none can be contemplated. On the other hand, if it be not granted, appellees admit they will proceed to dismantle the road and dispose of the property. According to the records the company is solvent. It owes no debts. If it be compelled to keep its property in status quo pending this appeal, it will be able to abide the final judgment in this court. If not, and it disposes of its property as it admits it will, it would become insolvent and could not then be compelled to rebuild its tracks and operate its trains. The question at issue would become a moot question and the jurisdiction of the court destroyed.

We respectfully submit that no damage would result to appellees by reason of an injunction or restraining order

as prayed for and that a failure to grant it would result in destroying the subject matter of the litigation and the State of Texas would be defeated in its right to have the matters at issue decided by the Supreme Court.

C. M. CURETON, *Attorney General,*
BRUCE W. BRYANT,
WALACE E. HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorney Generals,
Solicitors for Appellant.



FILED

APR 18 19

JAMES D. M.

No. 8-298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

STATE OF TEXAS

vs.

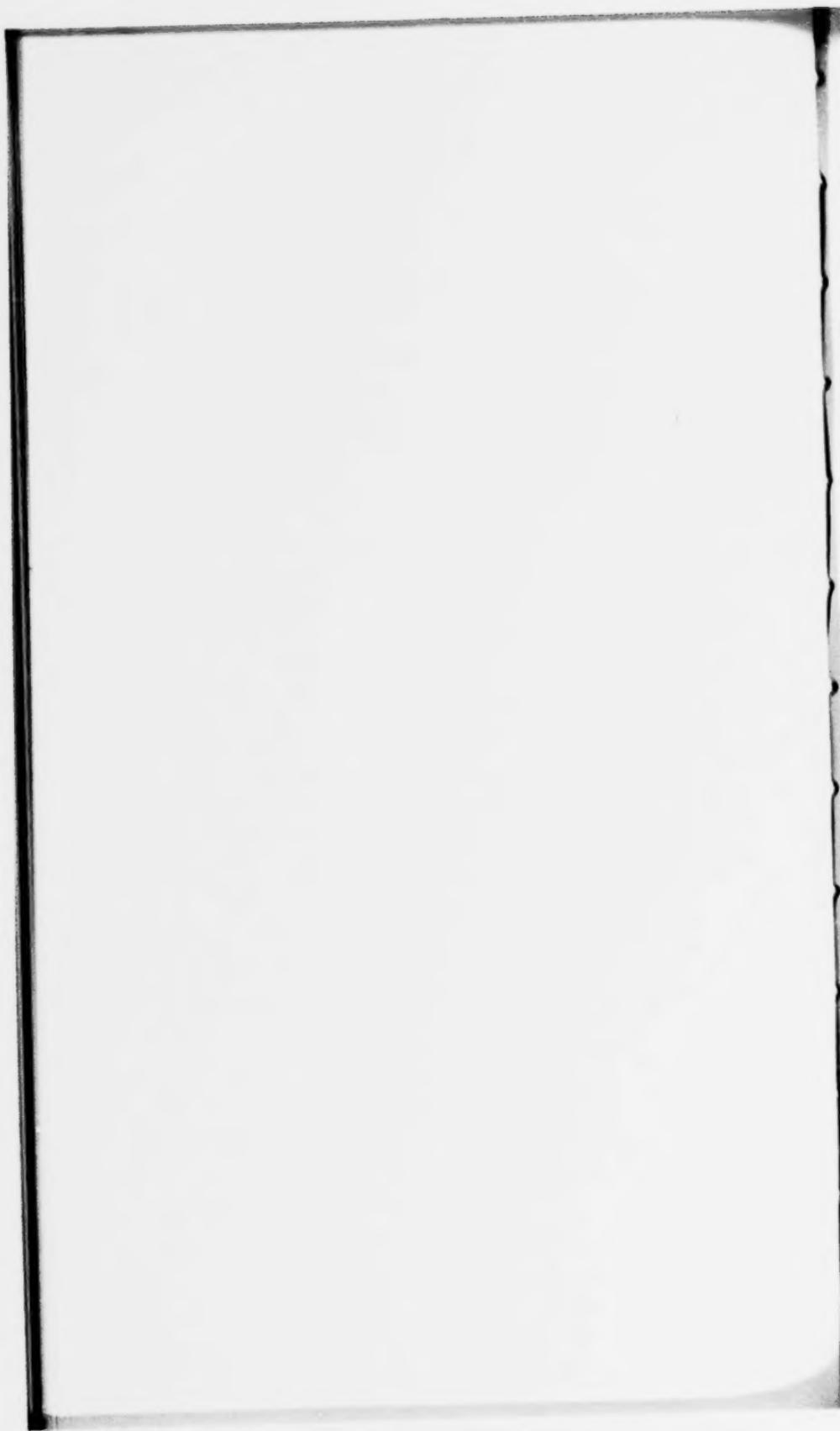
EASTERN TEXAS RAILROAD COMPANY, ET AL.

No. —.

Appeal from the District Court of the United States for the Western District of Texas.

Answer of Defendants to Application of the State of Texas for Supersedeas or an Order Suspending the Decree Dissolving the Temporary Injunction to Maintain the Status Quo Pending the Appeal.

DANIEL UPTHEGROVE,
E. B. PERKINS,
Solicitors for Defendants.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1920

STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL.

No. ——.

Appeal from the District Court of the United States for the Western District of Texas.

Now comes the EASTERN TEXAS RAILROAD COMPANY, a railway corporation, E. B. PERKINS, F. W. GREEN, DANIEL UPTHEGROVE, and E. J. MANTOOTH, defendants in the above-entitled action, and for answer to the application by the State of Texas for an order suspending the decree of United States District Court for the Western District of Texas, dissolv-

ing the restraining order heretofore granted in this cause and for this Court to grant an injunction to preserve the *status quo* pending this appeal, and say—

I.

Defendants admit the facts alleged in paragraph (1) of said application, except that the law of Texas permitting the abandonment of railroads and the operation thereof has never been repealed, but say that said laws of the State of Texas have been repealed by the Acts of Congress hereafter referred to.

II.

Defendants admit the facts alleged in paragraph (2) of said application, except the fact that the charter heretofore granted by the State of Texas to the defendant, Eastern Texas Railroad Company, was a charter contract between said railroad and the State of Texas; and says that said charter was granted by said State subject to the paramount authority of Congress to amend, cancel or set aside the same.

III.

Defendants admit the facts alleged in paragraph (3) of said application, except the fact that since the acquisition of the stock of the Eastern Texas Railroad Company by the St. Louis South Western Railway Company that the said Eastern Texas Railroad Company has been operated as a branch

of the St. Louis South Western Railway Company of Texas; and say that the said Eastern Texas Railroad Company is now and has always been operated as an independent corporation in accordance with the laws of the State of Texas.

IV.

Defendants admit the facts alleged in paragraph (4) of said application, and that the Interstate Commerce Commission on December 2, 1920, issued its report and order authorizing the Eastern Texas Railroad Company to abandon its line of railroad and to take up, dismantle, or remove any part or all of the property of said company, and in any lawful manner dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated; that in granting said certificate of public convenience and necessity the Interstate Commerce Commission fully complied with all the terms, conditions and requirements of Section 1 of the Act to Regulate Commerce as amended by paragraphs (18), (19) and (20) of the Transportation Act of 1920; that for the convenience of the Court copy of said report and order of the Interstate Commerce Commission is hereto attached, marked "Exhibit A" and made a part hereof.

V.

The defendants admit the facts alleged in paragraph (5) of said application.

VI.

Defendants admit the facts alleged in paragraph (6) of said application.

VII.

The defendants admit the facts alleged in paragraph (7) of said application.

VIII.

Answering paragraph (8) of said application, defendants admit the facts set up and alleged as facts, but say that there are no facts alleged in said paragraph sufficient to show any grounds for equitable relief, but that the matters therein alleged are statements of legal conclusions and are immaterial and irrelevant.

IX.

Defendants admit the facts alleged in paragraph (9) of said application.

X.

Defendants admit as alleged in paragraph (10) of said application that the Eastern Texas Railroad Company has never made application to the State of Texas, nor to the Legislature of said State asking for the permit to abandon the operation of the trains and dismantle its road; but says

that it did obtain authority from the Interstate Commerce Commission to abandon the operation of its trains and dismantle its road as hereinbefore stated and that the power granted by Congress to grant said defendant the right to abandon said road was paramount, and that it is not and was not necessary to obtain the consent of the State of Texas so to do.

XI.

Defendant, Eastern Texas Railroad Company admits as alleged in paragrph (11) of said application that it received certain donations of right-of-way when its line was constructed, and it is without sufficient knowledge to affirm or deny the allegations in said paragraph that a town was established by said railroad company and that the purchasers who bought same built houses, business houses and shops of a permanent nature, but say that all the allegations in said paragraph are immaterial and irrelevant and show no grounds for equitable relief by the State against said railroad company.

XII.

The defendants admit the facts plead by the State of Texas in paragraph (12) of said application, except the fact alleged that all of the business of the Eastern Texas Railroad Company is carried on and operated by the St. Louis & South Western Railroad Company of Texas; that the

business of the Eastern Texas Railroad is carried on, and said line is operated by said company, and is not carried on and operated by the said St. Louis South Western Railway Company as therein alleged.

XIII.

Defendants admit the facts alleged in paragraph (13) of said application except that all the business of the Eastern Texas Railroad is carried on and operated by the St. Louis Southwestern Railway Company of Texas, but deny said facts and allege that said Eastern Texas Railroad Company in its own corporate capacity carries on its business and operates its said line of railroad.

XIV.

Defendants admit the facts alleged in paragraph (14) of said application but say that said facts are immaterial, irrelevant, and show no ground for equitable relief by the State of Texas.

XV.

Defendants admit the facts alleged in paragraph (15) of said application.

XVI.

For answer to paragraph (16) of said application defendants admit that unless restrained by an

order of this Court that it will proceed to carry out the order heretofore entered by the Interstate Commerce Commission as herein alleged, but defendants deny that the State of Texas has the right to enjoin said Eastern Texas Railroad Company from dismantling and disposing of its property as authorized by the Interstate Commerce Commission, as will be hereinafter more fully set out.

Defendants deny the legal conclusions therein plead and say that the same are immaterial and irrelevant and show no grounds of equitable relief.

XVII.

Answering further herein defendants say that as hereinbefore alleged the Interstate Commerce commission in granting said certificate of public convenience and necessity to the said Eastern Texas Railroad Company has fully complied with all of the terms, conditions and requirements of the Acts of Congress authorizing the abandonment of railroads; and that said order of the Interstate Commerce Commission is binding, final and conclusive on both the United States District Court for the Western District of Texas, before whom this case was tried and upon this Court, and is not subject to collateral attack by the State of Texas in this cause.

XVIII.

For further answer herein the defendants say that the Interstate Commerce Commission made

the following finding of facts as to physical condition of the Eastern Texas Railroad Company: "The line was laid with 35 pound steel rails which are not badly worn but are both line and surface bent to such an extent that it is said trains cannot safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills there are 50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition."

The defendant, Eastern Texas Railroad Company, further shows that if it is not permitted to at once take up, dismantle, and remove all of the said property that by reason of its physical condition as shown by said finding of the Interstate Commerce Commission, that it will suffer great and irreparable loss and damage, and that it will be unable to salvage said property; that the State of Texas has not tendered to this Court any bond or other security to protect and indemnify said railway company from loss and damage during the pendency of this appeal, and that by reason of said State of Texas being a sovereign State no suit or cause of action can be maintained against said State without its consent by the said railroad company, and said company will be without recourse either in law or equity to recover the loss and damage sustained by it by reason of the granting of an

injunction by this court during the pendency of this appeal.

XIX.

Answering further herein defendants say that upon the trial of this cause upon its merits before the said District Court for the Western District of Texas, the State of Texas made the issue that said court should keep the injunction in force preventing the defendant railroad company from dismantling its property during the pendency this appeal.

That said issue was again raised by the State of Texas in its application for an appeal from the order of said court dissolving said injunction and in its assignments of error presented to said District Court, and said court, having before it all the parties and the entire subject matter of this litigation, acting within its sound discretion, refused to continue said injunction in force during the tendency of this appeal.

That said application of the State of Texas shows no facts or circumstances wherein the District Court abused the discretion vested in it by law and the rules of this court, wherefore, these defendants state that the action of said District Court in refusing to continue said injunction in force during the pendency of this appeal is binding and conclusive upon the parties hereto and upon this court.

XX.

The statement made in this answer are from the pleadings and are admitted unless and except in the instances indicated by the wording hereof.

WHEREFORE, defendants pray that said application for an injunction by the State of Texas restraining the said Eastern Texas Railroad Company from taking up, dismantling or removing any or all of its property during the pendency of this appeal be dismissed; but that if this Court grants the injunction as prayed for by the State of Texas that it be required to give bond or other security to protect and indemnify the defendant Railway Company for all loss and damage sustained by it by reason of such injunction and for such other and further orders as they, or either of them, may be entitled to in the premises.

Respectfully submitted,

DANIEL UPTHEGROVE,

E. B. PERKINS,

Solicitors for Defendants.

THE DISTRICT OF }
COLUMBIA } *ss.*

Daniel Upthegrove, being duly sworn, deposes and says that he is one of the Solicitors for the appellees named in the foregoing answer and is familiar with the facts therein set forth; and affiant further states that the facts stated in the foregoing answer are true as therein stated.

Subscribed and sworn to before me on this the
— day of April 1921.

EXHIBIT A

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 4.

IN THE MATTER OF APPLICATION OF THE EAST- ERN TEXAS RAILROAD COMPANY FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY.

Submitted September 27, 1920.

Decided December 2, 1920.

Certificate of convenience and necessity issued authorizing the Eastern Texas Railroad Company to abandon its line of railway between Lufkin, Tex., and Kennard, Tex.

E. B. Perkins, Daniel Upthegrove, E. J. Mantooth, and E. B. Strand, Jr., for Eastern Texas Railroad Company.

V. L. Brooks, S. N. Townsend, J. R. Painter, I. D. Fairchild and Clay Stone Briggs, for protestants.

John C. Box, for Lufkin Chamber of Commerce and Angelina County, Tex.

REPORT OF THE COMMISSION.

DIVISION 4, COMMISSIONERS MEYER, DANIELS, EASTMAN and POTTER.

BY DIVISION 4:

The Eastern Texas Railroad Company, hereinafter called the Eastern Texas, by petition filed June 3, 1920,

seeks a certificate of convenience and necessity to permit it to abandon its line of railway in Angelina, Trinity and Houston counties, Texas.

The Eastern Texas extends from Lufkin, Tex., in a westerly direction, 30.3 miles to Kennard, Tex., and has in addition to this main line track about 4 miles of switch, yard, and passing tracks. At Lufkin, its tracks connect with those of the St. Louis Southwestern Railway Company of Texas, hereinafter called the Cotton Belt, the Houston, East & West Texas Railroad, the Groveton, Lufkin & Northern Railway, the Texas Southeastern Railroad, and the Angelina & Neches River Railroad. Applicant has no other railroad connections. It maintains a joint agency with the Cotton Belt at Lufkin, has agency stations at Ratcliff, Tex., and Kennard, and has 6 sidetracks at other points where carload freight may be received or delivered. It owns 1 combination passenger, mail and express car, but no other rolling stock. It rents 1 light locomotive from the Cotton Belt, and pays per diem, under the code rules, for foreign cars while on its line. The only regular service it maintains is 1 mixed freight and passenger train daily, except Sunday, between Lufkin and Kennard.

The Eastern Texas was incorporated November 8, 1900, under the general railroad incorporation laws of Texas, to construct a railroad from Lufkin to Crockett, Tex. Its line was constructed to Kennard in 1901 and 1902, and has been continuously operated since, though it has not been extended to Crockett. The company was promoted and financed by individuals interested in the Texas, Louisiana Lumber Company, hereinafter called the lumber company, which is a subsidiary of the Central Coal & Coke Company of Kansas City, Mo. A substantial amount of applicant's rights of way was donated to it by the owners of the land. It never received a land grant from the state, nor exercised the right of eminent domain. It was originally authorized to issue \$150,000 capital stock, which amount was increased in 1902 to \$1,000,000. Shares of stock with a par value of \$454,500, but no bonds, have been issued. On September 1, 1916, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, herein-after called the Southwestern, which, except for the directors' qualifying shares, still holds it. There is substantial identity between the officers of the Eastern

Texas and the Southwestern, and the two roads have twice endeavored to consolidate since the stock purchase by the latter. The Texas legislature has refused to authorize the consolidation unless the Eastern Texas would extend its line to Crockett.

Applicant's line was constructed primarily to serve the lumber company which then owned 116,000 acres of pine-timber land near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the south for the production of lumber and forest products. Applicant built numerous tram roads through this timber to connect with its main line. On August 28, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value \$94,604.49, to the lumber company. This sale was made in contemplation of the transfer of the Eastern-Texas stock to the Southwestern for bonds of that company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

The Ratcliff mill ceased operation about 1917, and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line.

Applicant contends that since the removal of the mill there is not, and within any reasonable time will not be, enough traffic offered to produce revenue sufficient to pay its operating expenses. It shows that the country it serves is largely cutover timber land, and soil poor, and the agricultural development very limited except in the vicinity of Ratcliff and Kennard. It points out that the area is sparsely settled, particularly between those two towns where it is estimated that some 600 people live; and that there are no other towns or villages along the line. Ratcliff is said to have a population of 900 and that of Kennard is estimated at 1200. The timber from some 20,000 acres of land, along applicant's line, owned by the Southern Pine Lumber Company is transported either by the Texas Southeastern Railroad or the Groveton, Lufkin & Northern Railway. Three small mills, installed after the abandonment of the Ratcliff mill on account of the abnormally high prices of lumber and forest products, ceased operating with the decline in the lumber market and were closed at the time of the hearing. The lumber company now owns about 84,000 acres

of land surrounding Ratcliff and Kennard on some of which the second growth of timber is said to be of marketable size, but it is not yet in condition to be profitably cut.

About 70 per cent of the traffic handled by the Eastern Texas in 1916 consisted of forest products. Agricultural products totaled less than 10 per cent, and the remaining 20 per cent was made up of mine products, animals, manufactured products, merchandise and other commodities. During each of the 4 years immediately preceding June 30, 1913, mine products, consisting chiefly of bituminous coal used at the Ratcliff mill, exceeded the products of agriculture and animals combined; but the coal tonnage decreased from 6,886 tons in 1913 to 36 tons in 1918, and no coal moved in 1919, nor during the first 5 months of 1920. The greatest volume of agricultural products moved since 1909 was the 6,592 tons carried in 1914. This traffic had decreased to 2,072 tons in 1919, and 1,038 tons was moved in the first 5 months of 1920. The tonnage of forest products from 1909, to 1917, ranged from 41,312 tons in 1915 to 66,936 tons in 1917. Only 25,738 tons of this traffic moved in 1918, 14,966 tons in 1919, and 9,958 tons in the first 5 months of 1920. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first 5 months of 1920. Exhibits offered showed a detailed statement of the freight tonnage handled by applicant from 1909 to 1920.

The income of the Eastern Texas shows a corresponding shrinkage since 1912 except for the year 1917. Applicant's gross income for the year ended June 30, 1920, was \$31,210 and its net income \$24,494.21. The corresponding figures for 1917 were \$17,336.95 and \$6,391.57. Its operating expenses exceeded its operating revenues by \$9,699.66 in 1918, by \$4,086.15 in 1919, and by \$24,207.10 in the first 5 months of 1920. The total deficit incurred in 1918 was \$20,128.46, in 1919 it was \$19,362.61 and in January and February of 1920 it was \$10,484.27. The Eastern Texas was under Federal control during 1918, 1919, and the first 2 months of 1920, and its net corporate income was \$2,942.36 in 1918 and \$5,041.74 in 1919. There was a deficit of \$2,033.19 for March, 1920, \$4,455.51 for April, 1920, \$11,703.96 for May, 1920, and applicant estimated its total deficit for the year would be \$68,824.68, exclusive of large expendi-

tures necessary for maintenance of way to place the road in safe operating condition. Applicant's general balance sheet shows a credit balance of \$32,393.68 on May 1, 1920.

Applicant states it will furnish bond in the sum of \$100,000 for the cancellation of all of its outstanding obligations, and that the Southwestern will guarantee said bond and advance to applicant sufficient funds to pay or secure the payment of wages, accrued taxes, claims, loans, bills payable and all other lawful obligations outstanding at the date of abandonment, if abandonment is authorized, whether the indebtedness or obligation is or is not audited and reflected in applicant's account, and whether the claim has been or may later be presented.

Rates to and from Lufkin apply to and from Ratcliff and Kennard on interstate traffic, which comprises approximately 75 per cent of applicant's total tonnage. The divisions between the Eastern Texas and the Cotton Belt are said to be on a more liberal basis than is ordinarily allowed individual short-line connections, and applicant contends that it would be impossible to increase its rates or divisions in an amount sufficient to make its revenues meet its operating expenses. Its operating ratio was 440 per cent under the rates in effect immediately prior to the increases authorized in *Increased Rates, 1920*, 58 I. C. C., 220.

The Eastern Texas was originally well laid out from an engineering standpoint, the roadbed being generally level and the grades and curves short. The maximum gradient is slightly more than 1 per cent and the sharpest curve is about 4 degrees. The line was laid with 35 pound steel rails which are not badly worn but are both line and surface bent to such an extent that it is said trains cannot safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills, there are 50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition. Six bridges and trestles, with a combined length of 2,282 feet, are in need of immediate renewal to insure safe operation and all of the others require heavy repairs. Embankments and fills have fallen away, particularly at bridge and trestle approaches,

to such an extent that the ties are not properly supported. The slopes of cuts and ditches have fallen in, damaging the draining so that, in many places, ties are covered with dirt. Applicant estimates that if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges and trestles, due largely to deferred maintenance, attendant on the operation of the line at a loss.

The people of the community served by the Eastern Texas object to the granting of the certificate. It is shown that in case of abandonment of the road the nearest railway stations would be Crockett on the International Great Northern Railway, about 17 miles from Kennard and 20 miles from Ratcliff, and Wells, Tex., on the Cotton Belt, about 20 miles northeast of Ratcliff. The public highways in this territory are not well improved. A fair, graded, clay-and-sand road extends from Ratcliff through Kennard to Crockett, but this road becomes soft during the rainy season. Another road not as good extends from Ratcliff through Sullivan Ferry to Wells. A road from Sullivan Ferry to Lufkin parallels the railroad for approximately 9 miles. Other roads extend from the general territory served by applicant to Morrell, Tex., and Alto, Tex., on the Cotton Belt and to Groveton, Tex., on the Groveton, Lufkin & Northern Railway. Livestock produced in the vicinity of Ratcliff and Kennard hitherto has been driven to Crockett on account of better transportation facilities at that point. If the abandonment is permitted, it will be necessary to dray cotton and forest products a considerable distance to stations, but probably no further than some of the cotton produced in Texas is now hauled. Objectors testified as to the general conditions of the territory and the prospects for further increases in tonnage, but made no definite showing that within any reasonable time, there would be sufficient tonnage to pay the operating expenses of the road. To meet their objections, applicant has offered to sell its line to any local interests for \$50,000.

Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of \$50,000. A certificate and order to that effect will be issued.

Certificate of Public Convenience and Necessity.

At a Session of the Interstate Commerce Commission,
Division 4, Held at Its Office in Washington, D. C., on
the 2d Day of December, A. D., 1920.

Finance Docket No. 4.

In the Matter of Application of THE EASTERN TEXAS
RAILROAD COMPANY for a Certificate of Convenience
and Necessity.

Application No. 1 Ab-1.

Be it known, that on the third day of June, 1920, the Eastern Texas Railroad Company, a carrier subject to the Interstate Commerce Act, filed with the Interstate Commerce Commission its application for a certificate of public convenience and necessity to abandon all of its lines of railway between Lufkin, Tex., and Kennard, Tex., situated in the Counties of Angelina, Trinity and Houston, in the State of Texas, pursuant to the provisions of paragraphs 18, 19, 20 and 21 of Section 1 of the Interstate Commerce Act:

That upon receipt of such application the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas and caused said notice to be published for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operates;

That after applicant had made due return to the questionnaire showing the facts and circumstances with respect to such proposed abandonment; and after due notice to all parties in interest, a hearing was held on said application on the 19th day of July, 1920, at Austin, Tex., and on the 26th day of July, 1920, at Ratcliff, Tex., at which all parties in interest were given opportunity to appear and be heard in the premises;

That after said case was submitted, representations were made to the Commission by the Legislature of Texas by a joint resolution with respect to the jurisdiction of this Commission in these proceedings;

That on the 2d day of December, 1920, the Commission, by Division 4, made and filed a report containing its

findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof;

Now, therefore, upon the record in this proceeding,

The Interstate Commerce Commission hereby certifies, that the present public convenience and necessity permit of the abandonment of all of the lines of railroad of the Eastern Texas Railroad Company as follows, to wit:

Between Lufkin, Tex., and Kennard, Tex., through the counties of Angelina, Trinity and Houston, in the State of Texas;

It is therefore ordered, That the Eastern Texas Railroad Company be, and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated.

Provided, however, That the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed \$50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad;

Provided further, That the Eastern Texas Railroad Company, be, and it is hereby, required to furnish to the Interstate Commerce Commission a good and sufficient bond secured by the St. Louis Southwestern Railway Company in the penal sum of \$100,000, to be approved by the Secretary of the Interstate Commerce Commission, conditioned on the understanding that the said Eastern Texas Railroad Company will, before the expiration of one year after the date of this certificate, adjust, settle and pay all outstanding debts, obligations, judgments, liens, or mortgages, together with all taxes and assessments, Federal, State or municipal, due or to become due, and all claims or judgments for damages to persons or property.

Provided, further, That before suspending operation of said railroad or of any service now being rendered thereon, said Eastern Texas Railroad Company shall give at least thirty days' notice to the public of the date at which such service will be discontinued, said notice to be

posted in a conspicuous manner in each station on said line of railroad; and

Provided, further That the Eastern Texas Railroad Company, when making application for cancellation of tariffs, shall refer to this certificate by title, date and docket number.

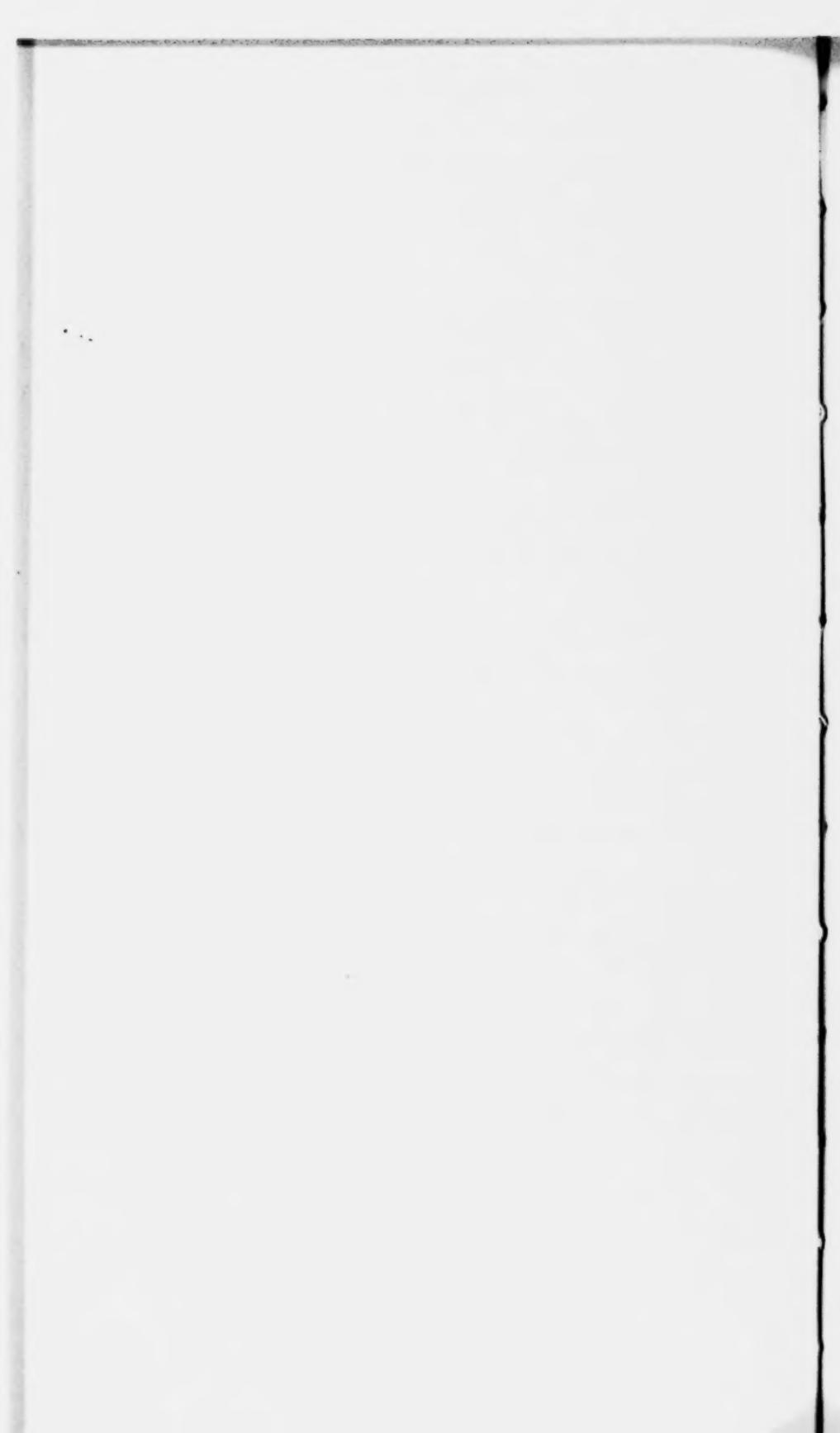
By the Commission, Division 4:

[SEAL.]

GEORGE B. McGINTY,
Secretary.

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(No. 28,227.)

In the Supreme Court of the United States

OCTOBER TERM, 1921

In Equity. No. 870.

THE STATE OF TEXAS, APPELLANT,

vs.

EASTERN TEXAS RAILROAD COMPANY ET AL.,
APPELLEES.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

INTRODUCTORY STATEMENT.

This is an appeal from an order dissolving the temporary injunction and also from a final decree of the district court, Western District of Texas, in a proceeding instituted by the State of Texas as a sovereign State in the Fifty-third Judicial District Court of the State of Texas and removed to the Federal court upon motion by defendants. The proceeding was to restrain the Eastern Texas Railroad Company, its officers and attorneys, from abandoning operation of its trains and from dismantling its road. Temporary injunction was granted by the Hon. George Calhoun, judge, on the 9th day of July, 1920, restraining defendants from abandoning the main line of defendants' road and from ceasing to carry

passengers and freight in intrastate commerce, and upon removal of the cause by order dated the 9th day of October, 1920, the temporary injunction remained in effect until order and decree appealed from, dated the 17th day of March, 1921, at which time plaintiff took an appeal from the order to the Supreme Court of the United States and upon motion obtained an order, dated April 25, 1921, from this court restraining defendants from dismantling its road and disposing of its properties pending the appeal. Defendant ceased operation on May 1, 1921, but has, so far as plaintiff is advised, kept its property intact in accordance with the order of this court referred to.

The case involves the construction and the constitutionality of the Transportation Act of 1920, and particularly of Section 4 thereof and of subdivisions (18), (19), (20), (21) and (22) of said Section 4, giving the Interstate Commerce Commission power and authority to grant a certificate of public convenience and necessity authorizing and directing construction and abandonment of railroads and their operation wholly within a State.

A question of jurisdiction was also raised, but not passed upon by the court, the contention being by the defendants that the court did not have jurisdiction to hear the case because the suit was not instituted in the United States District Court, wherein one of the petitioners before the Interstate Commerce Commission resides, as is provided by the Act of 1913 abolishing the Commerce Court and giving jurisdiction to the Federal district courts.

The defendant, the Eastern Texas Railroad Company, is incorporated under the laws of the State of Texas of date November 8, 1900, and is to exist for a period of twenty-five years. Its purpose, as stated in its charter, was to construct, own, maintain and operate a line of railroad from Lufkin, Texas, to Crockett, Texas, passing through Angelina, Trinity and Houston counties. After this suit was instituted and on December 2, 1920, it obtained an order from the Interstate Commerce Commission, denominated

a certificate of public convenience and necessity, authorizing and directing it to abandon operation of trains and dismantle and dispose of its tracks. The road is wholly within the State of Texas, and is located within the bounds of the district court for the Eastern District of Texas.

BILL OF COMPLAINT.

The original bill filed in the State court on July 9, 1920, complained of the defendant, the Eastern Texas Railroad Company, and of E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, alleging that they were conspiring together to abandon operation of trains and to dismantle the road in violation of the Constitution of Texas, and of an act of the Legislature in effect since April 8, 1889, forbidding the abandonment of operation and the removal of main line tracks of railroads in Texas. It also alleged matters restated in the supplemental or amended bill filed after the case was transferred to the Federal court. An injunction was obtained in the State court as prayed for, and thereafter the cause was transferred upon motion of the defendants to the United States District Court, Western District of Texas. The original bill was filed, the temporary injunction was granted, and the transfer made to the Federal court long prior to the issuance of the certificate of public convenience and necessity by the Interstate Commerce Commission to the Eastern Texas Railroad Company authorizing and directing it to abandon operation of its trains and dismantle its tracks.

On January 15, 1921, the State of Texas filed its supplemental bill of complaint, in which was alleged the charter contract between the State of Texas and the Eastern Texas Railroad Company, the Constitution and statutes of the State of Texas, and particularly the Act of April 8, 1889, were pleaded in bar of the defendants' right to abandon operation of the trains and dismantle the track. It is alleged that the railroad consists of thirty and

three-tenths (30.3) miles, situated wholly within the State of Texas; that it obtained its charter as a common carrier with all the rights and privileges of receiving passengers and freight for transportation and charging rates and fares therefor, with the right of interchange of traffic between it and connecting carriers and with the right of eminent domain; that it was also subject to the laws of the State of Texas and to the rules and regulations of the Railroad Commission of the State of Texas.

It is alleged that on the 28th day of August, 1906, the defendant railroad company sold its net current assets and its rolling stock to the Louisiana & Texas Lumber Company, and that on September 1, 1906, the St. Louis Southwestern Railway Company, a Missouri corporation, acquired the entire capital stock of the Eastern Texas Railroad Company, and still owns same, except qualifying shares owned by its board of directors; that since that date the Eastern Texas Railroad Company has ceased to exist as a separate entity, but has been owned and controlled and operated by the purchaser of its capital stock, having substantially the same officers and directors; it is further alleged that thereby the Eastern Texas Railroad Company became a part of the system known as the St. Louis Southwestern Railway Company, comprising 810.50 miles in the State of Texas and a total of seventeen hundred and fifty-three and eighty-three hundredths (1753.83) miles in the United States; it is also alleged that up to and including the year 1917 the defendant railway company earned and received a substantial net corporate income and accumulated a surplus and profit account, but that it deferred its maintenance and permitted its properties to run down, expending no substantial portion of its income for maintenance and betterment; it is further alleged that if it be true, as claimed by the railroad company, that it did not earn its profit for the years since 1917, that same was because of the war conditions and because of the conditions of reconstruction, and that it would within a reasonable time pay operating

expenses and again make a profit for its owners; it was also alleged that it owed no debts and was financially able to make the needed repairs and carry on its operations.

The sovereignty of the State of Texas was pleaded with a claim of its right to create and control private corporations and particularly private corporations engaged in the business of common carriers, the property of which was wholly within the State; denying to Congress the authority to determine questions of law, either directly or through the Interstate Commerce Commission, and to adjudicate the rights of the State of Texas and authorize the abandonment of the Eastern Texas Railroad Company under the Constitution of the United States by claiming the right thereunder to have such matters adjudicated in the Supreme Court of the United States with the State of Texas as the proper party. It was also alleged that the State of Texas, in the exercise of its sovereign rights, had adopted a State Constitution in 1876, and in pursuance of its provisions has enacted laws for the regulation and control of common carriers within the State, completely protecting the rights of such carriers and also the rights of the State of Texas; that such laws were in effect at the time the Eastern Texas Railroad Company received its charter and have since continued to be in effect and enforced. Among the provisions and enactments was that forbidding the abandonment of operation of trains and dismantling of its tracks. It was alleged that certificate of public convenience and necessity ordered and decreed by the Interstate Commerce Commission and upon which defendant relies was (a) beyond the power which it could constitutionally exercise; (b) beyond its statutory powers; (c) confiscatory of the contract rights of the State of Texas embraced within the charter of the defendant and the several statutes and the Constitution of the State of Texas, which constituted a part of the same, and in violation of the Fourteenth (14th) Amendment of the Constitution of the United States; (d) that the granting of such certifi-

cate was without evidence or without sufficient evidence in law to support the same, and arbitrary and unjust and that the Commission, in granting the same, exercised its authority in such an unreasonable manner that the granting of the same was and is void; (e) that the granting of such certificate was against the evidence before the Commission; was and is contradictory to the actual findings of fact made by the Commission itself, though said findings of fact are more restrictive and more favorable to the defendant than the evidence would warrant. For all of these reasons it was alleged that the certificate of public convenience and necessity is null and void.

THE ANSWER.

One answer was filed for all of the defendants admitting the incorporation of the Eastern Texas Railroad Company, and the residence of the other defendants as alleged, but denying the provisions of the law of the State of Texas, explaining with such denial their contention that the Constitution and laws of Texas had been superseded by the laws enacted by the Congress of the United States regulating interstate commerce and particularly pleading Section 1 of the Transportation Act of 1920, raising the issue as to the effect of the Interstate Commerce Act, with its several amendments upon the State statutes and as to which is paramount as applied to the defendant railroad company and the questions involved. The defendant admitted its intention to abandon operation of its entire line of railway, provided a certificate of public convenience and necessity should be granted by the Interstate Commerce Commission upon its application then pending.

Defendants deny the allegations in plaintiff's bill of complaint to the effect that in accepting and exercising the power and authority conferred upon it by its charter, the Eastern Texas Railroad

Company obligated itself as alleged, and entered into such contract with the State of Texas as alleged, and says it had no power to do so but relied upon and pleaded the provisions of the Transportation Act of 1920 and the authority of Congress under the Constitution to regulate commerce.

Defendants affirmatively allege that the line of railroad in question was originally built for the purpose of hauling products from a large saw mill and manufacturing plant near Kennard, alleging that the plant depended for its operation upon timber which it could procure in the territory adjacent and contributory to said plant and that said timber has been cut out and manufactured and the products thereof shipped out and said mill dismantled and removed, since which time there is not sufficient traffic over said line to pay its operating expenses and its maintenance and necessary upkeep; that it has no funds upon which to operate and could obtain none, all of which was alleged in its application to the Interstate Commerce Commission which it attached as an exhibit, making same a part of its answer. Defendants denied the authority of the court to issue the injunction and prayed for its dissolution.

On December 18, 1920, the defendant filed a supplemental answer to which they attached the certificate of public convenience and necessity, authorizing the abandonment of the road, dated December 2, 1920, again attacking the authority of the court to issue injunction and praying for its dissolution. There is no denial of the ownership by the St. Louis Southwestern Railway of the stock of the Eastern Texas and the identity of officers as alleged by plaintiff.

PETITION FOR REMOVAL.

On October 4, 1920, the defendants filed a motion with the district court of the Fifty-third Judicial District of Texas, asking

removal of the cause, alleging that the action arose under the Constitution and laws of the United States. They presented a removal bond and prayed that it be removed to the United States District Court for the Western District of Texas.

ORDER OF REMOVAL.

Thereafter, on October 19, A. D. 1920, the Honorable George Calhoun, judge of the district court of the Fifty-third Judicial District of Texas, entered his order in compliance with defendants' prayer, removing said cause to United States District Court for the Western District of Texas.

MOTION TO DISSOLVE INJUNCTION.

On December 18, 1920, defendants filed the motion to dissolve the temporary writ of injunction. A dissolution of the injunction was sought on the ground that the Acts of Congress were paramount and superseded the Constitution and laws of the State of Texas; that the matters of fact pleaded in the original answer and supplemental answer of defendants in reply thereto, in denial of, and in explanation of the allegations contained in the bill, alleging that plaintiff did not, at the time of filing this suit, have any cause of action against the defendants, or either of them, authorizing the issuance of writ of injunction; that Congress has, under the power given it to regulate commerce, the authority to authorize the Interstate Commerce Commission to grant the certificate of public convenience and necessity alleged.

In its supplemental motion to dissolve the injunction filed on March 15, 1921, defendants pleaded their acts in good faith under the Transportation Act of 1920; the order issuing the certificate of public convenience and necessity and their compliance therewith and praying, as in its original motion, that temporary injunction be dissolved.

DECISION OF THE DISTRICT COURT.

The court found that upon the motion to dissolve the injunction two issues had been raised by the pleadings and argument of counsel, the first being that the acts of the Interstate Commerce Commission in attempting to exercise the functions and duties imposed upon it by the Transportation Act and particularly that which authorized said commission to take cognizance of applications for the dismantling and abandonment of railroad properties, are unconstitutional because in such acts Congress had attempted to confer power upon the Interstate Commerce Commission, which was not within the contemplation or the meaning or interpretation of the original constitutional enactment, conferring power upon Congress to regulate commerce.

The second question raised was whether or not the State should have proceeded under the Act of 1913, known as the act abolishing the commerce court and conferring jurisdiction upon the district courts, to file a proceeding in the district wherein the petitioners before the Interstate Commerce Commission, or one of them, reside, to have the order of the Interstate Commerce Commission set aside.

A review was then given in a general way of the tendency of legislation by Congress claiming for it additional power from time to time under this provision of the Constitution and also the holdings of the court thereon. The court observed that there is no authority, so far as the decision of the courts are concerned, for the exercise of such power by Congress, but gave as an opinion that the Supreme Court would in its decree attribute to Congress this power, though not heretofore claimed and exercised by it. The motion was therefore sustained upon the theory of defendants' contention that the findings and order of the Interstate Commerce Commission were not subject to collateral attack.

The second question was not passed upon by the court because

his holding upon the first question was such as to eliminate necessity for a decision upon the second—in passing upon the question the court assumed jurisdiction.

Evidence was then tendered upon the issues raised by the pleadings, but the court declined to hear the evidence offered by plaintiff, and found for the defendants, adjudging all costs against plaintiff.

From the court's order, dissolving temporary injunction, and from its decree, appeal was duly taken and allowed to the Honorable Supreme Court of the United States.

CLAIM OF APPEAL.

Upon the decision of the court being announced, plaintiff in open court gave notice of appeal and thereafter on April 2, 1921, filed its formal petition or claim of appeal direct to the Supreme Court of the United States, which claim was allowed by the court.

ERRORS ASSIGNED.

On April 2, 1921, plaintiff filed its assignments of error.

The first error claimed is that the records on their face show that no consideration should be given to the certificate of public convenience and necessity issued by the Interstate Commerce Commission on December 2, 1920, and pleaded by defendants.

The second error claimed is to the ruling of the court in refusing to permit plaintiff to introduce the evidence showing and tending to show that the findings of the Interstate Commerce Commission were untrue, arbitrary, unreasonable and unjust and without evidence to support it and contrary to the law and evidence.

The third error claimed complains of the ruling of the court in holding that Subdivisions (18), (19), (20), (21) and (22) of Section 1 of the Transportation Act, approved February 28,

1920, were constitutional, and that the law was with the defendants in said cause.

The fourth claim of error complained of the ruling of the court in interpreting Subdivisions (18), (19), (20), (21) and (22) of Section 1 of the Transportation Act, approved February 28, 1920, so as to grant the Interstate Commerce Commission authority to order the Eastern Texas Railroad Company to abandon operation and dismantle its property contrary to the laws of the State of Texas and contrary to its charter contract.

STIPULATION.

On the 4th day of April, 1921, stipulation agreed to by attorneys on both sides setting forth and agreeing to what should constitute the record on appeal was duly filed with the clerk and thereupon the record was prepared and forwarded to the Supreme Court of the United States on the 13th day of April, 1921, under equity No. 870, file No. 28277.

THE TRANSPORTATION ACT AUTHORIZING THE INTERSTATE COMMERCE COMMISSION TO GRANT CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY DOES NOT EXCLUDE THE AUTHORITY OF THE STATE.

A proper interpretation of paragraphs (18), (19), (20) and (21) of Section 1 of the Transportation Act does not exclude the authority of the State, but only directs the Interstate Commerce Commission to grant its authority, under conditions to be prescribed by it, for the withdrawal by the carrier from engagement as an interstate carrier.

In this connection we call attention to the language employed by Congress in the Transportation Act, which appellees contend excludes the authority of the State:

“From and after issuance of such certificate, and not before, the carrier by railroad may, *without securing approval*

other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby." (Paragraph (20), of Section 1.) (Italics ours.)

In order to properly understand the meaning of this language, it is necessary to discuss the principle of the act and the purpose for which it was enacted.

The United States had taken charge of the railroads of the country and operated same to meet the emergencies of the war. Unusual legislation had been passed which could be held constitutional only on the ground that an emergency demanded it. The roads are now to be turned back to the owners. The theory asserted itself in Congress that the roads were in a weak and helpless condition, and in order to sustain them it would be necessary for the government to extend a helping hand. The Interstate Commerce Commission was delegated to perform this service. It was authorized, under its interpretation of the act to divide the country into such number of groups as it may see fit and fix such rates as may be necessary for passengers and freight as would bring to all of the railroads within the group a specified return on the valuations found for all the carriers. Thus was linked together the entire system, and Congress foresaw that in order to foster and protect the carriers, it would be necessary to make immediate extensions and connections. Provisions were made by Congress to aid in financing such extensions in order that certain helpless carriers may have their lines extended, that they may perform fully the service and realize to the fullest extent the income available to it. At the same time Congress seemed to have recognized that certain carriers would be a burden to the entire group because they would not earn more than the operating expense, and their values added to the total values would demand the fixing of a higher rate for all of the territory to which such carrier would

not contribute its proportionate share. It was, therefore, provided that such carrier may be relieved either upon their own application or upon the Commission's initiative from engaging in interstate commerce—as expressed by counsel in arguing the case in the court below, there would be dead limbs which a good husbandman would see fit to prune from its tree. To this theory, and thus far, we subscribe. We assert, however, that when Congress had withdrawn interstate commerce from such carriers, by giving permission for their abandonment, the full purpose of the act has been accomplished and no further action was authorized. Let us look to this act and other acts of Congress for its interpretation.

Paragraphs (18), (19) and (20) provide alike for the extension and abandonment by carriers of their lines. If the language used in these paragraphs is complete and sufficient to exclude the State from any authority in the abandonment of the road, it is likewise sufficient to exclude such authority in the extension by a carrier of its line. Congress was not satisfied, however, to stop here, for it may be necessary to extend the line in order to properly foster and properly regulate interstate commerce, and to this end paragraph (21) was added, giving to the Commission power to authorize or require carriers to provide themselves with adequate facilities or to extend their line or lines, making provision for the enforcement of such order. Section (21) has no application to abandonments, but solely to extensions.

Under the authority given, it may be stated that the power of the State to forbid extensions has been superseded. It may be, with good reason argued also, that extensions become necessary to interstate commerce whether agreeable to the State in which they are made or not, and this given as a reason for the insertion of paragraph (21). If that same argument applied to abandonments, Section (21) should then have included abandonments, as well as extensions, but it does not. To our mind this is sufficient

to answer the argument that the State is excluded from any activity by the provision quoted from paragraph (20), but that is not all.

The language employed in paragraph (20), to wit: "without securing approval other than such certificates," is not the language customarily used by Congress when it excludes the authority of a State to act, nor is it sufficient to overcome the effect of the language used in paragraph (17) relating to the same subject. From it we quote:

"Provided, however, that nothing in this act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

Certainly this language shows Congress recognizes, in the act, the police powers of the State. The interpretation sought by appellees, and that given by the court below, recognizes no vestige of right or power in the State, but, on the contrary, annihilates the subject of its control. It is our contention that to overcome this provision and strip the State of all rights in the regulation of its intrastate commerce and its carriers the language immediately following this must be at least as plain and clear as that usually employed by Congress to exclude the State's authority in legislation on the same or similar subjects.

Congress has used language to exclude State authority both prior to and subsequent to the passage of the statute under discussion. When the country was involved in war and it became necessary that a central power should take charge of and control the commerce of the country without interference and when time was the essence of its power, when it became necessary that the State should surrender every right which it had to the central government, the act was passed giving to the President such power. Small limitations were placed upon his authority, but Congress,

composed of the representatives elected from the several States, was careful to preserve as far as possible the police powers of the States, and after making the provisions referred to, inserted a section reading as follows:

"Section 15. That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulation of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war material, government supplies or the issuing of stocks and bonds." (Federal Control Act.)

The intention of Congress in the foregoing cannot be mistaken. The time had not arrived when Congress was willing, even in so great an emergency as the act required, to strip the States of their rights and police powers nor to infringe upon them except for the purposes stated, which were declared to be necessary during the emergency.

The emergency passed and Congress quickly returned to the carriers their property. We have referred to its interest in rehabilitation by the carriers of their property to the end that the commerce of the country be not crippled at an important period in its commercial history.

As a further aid to the carrier and to insure the rehabilitation of their property, and for the further purpose of securing the government in any indebtedness by the several carriers to the government, an act was passed providing for the issuance of securities to extend over a period not exceeding ten years for the purpose of refunding the carriers' indebtedness to the United States. This is expressed in Section 207 of the Transportation Act. It was necessary that such indebtedness be refunded regardless of the requirements of any State. The indebtedness had been made. They had been made during an emergency when a State could afford to forego its rights and suspend its police powers for the

common good. That the government may be able to lend a further helping hand and the commerce of the country properly protected, it was necessary that security be given for such indebtedness and the power of the State to prevent it was excluded. The language used by Congress for this purpose cannot be mistaken. We copy the language as follows:

"(g) A carrier may issue evidences of indebtedness, pursuant to this section, without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification."

Further providing for the carriers in this respect, Congress created a revolving fund to be used in making new loans to railroads. Such new loans may be necessary in order to provide equipment, betterments and extensions to meet the conditions arising with the close of the war and in order to conserve the interest of the general public. An emergency is here seen as in the foregoing, and Congress again uses language similar to that quoted above and which cannot be mistaken. We quote from Section 210:

"(f) A carrier may issue evidences of indebtedness to the United States pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification."

If, during the great emergency existing, which called for the operation of the railroads of the country by the central government to the exclusion of the owners, Congress saw fit to preserve the police powers of the State, so far as was possible for the period of this emergency when it may be presumed that all the State's authority has been superseded, and if after its return, the acts were passed as referred to, which necessitated the power of the State, with reference to the issuance of securities, be superseded, Congress deemed it necessary in order that the authority of the

State be excluded to say so in plain and unmistakable language, should, then, this court feel called upon to construe the language as contended by appellees with reference to abandonments by carriers of the lines so as to exclude the authorities, the police powers of the State, when such exclusions are not necessary to meet the ends in view in passing the enactment, particularly in view of the distinctions made by the wording of the act between the powers of the Commission to order abandonment and its power to compel extensions?

We submit in the light of reasons given and the language quoted that Congress did not intend by the act, and that it does not exclude the authority of the State, but that the full purpose is served and the language of the law has been complied with when the Interstate Commerce Commission gives to the carrier its authority to abandon the operation of its line as an interstate carrier, leaving it then to be dealt with by the State creating its corporation and to which it owes its existence and with which it has a charter contract and obligation.

THE ACT AS INTERPRETED CONFERS JUDICIAL AUTHORITY UPON THE INTERSTATE COMMERCE COMMISSION.

It has been held by this court that the Interstate Commerce Commission is not a court created under the Constitution, and that it cannot be given judicial authority. As interpreted by the Interstate Commerce Commission, subdivisions (18) to (22) of Section 1, confer upon the Commission judicial authority. Acting upon such interpretation, the Interstate Commerce Commission issued what is denominated its certificate of public convenience and necessity authorizing appellee to abandon its road after having adjudicated what is recognized to be the interest of appellant and the obligations of appellee to appellant by determining the issues raised under the application for the certificate of public convenience and necessity. The proceedings in this regard were

judicial in form, as well as in fact. Upon the filing by appellee of its application alleging its corporate existence, the purpose of its organization, its losses for a period of time and its inability to make money in the future, notice was given to the State of Texas, as a party defendant, by serving notice upon the Governor of the State and also by publishing notice to unknown interested parties. Answer was filed and the questions of fact alleged, upon which appellee sought its certificate, were contested. They were questions of judicial ascertainment, not for future prospects in determining necessary and adequate rates, but of present condition and status to determine whether or not appellee should be compelled to comply further with its contract, or whether or not the circumstances existed which would relieve it from further obligation. It pleaded in its behalf its financial condition and alleged that to further require it to operate would be to take its property without due process of law and would be confiscatory and unreasonable; and further, that it is a burden on interstate commerce and was under the law authorized to abandon its contract, its operation under the laws of the State of Texas, and comply with the Federal law, the paramount law of the land, applying in this case. Upon this pleading the Interstate Commerce Commission adjudicated the facts and found in its order (Exhibit "A," page 53, and Exhibit "B," page 58, Record) that facts existed as alleged by appellee in its application and against the facts alleged by contestants. The decree was entered as shown in Exhibit "B," the two constituting a judgment and decree in form, purpose and effect. Upon this decree, it is asserted by appellee that all rights of the State of Texas and of its citizens have been finally adjudicated; that the district court trying this case had no jurisdiction to hear and determine the cause, which made a collateral attack upon such judgment, order and decree. The trial court found for appellee and declined to hear the testimony offered by appellant.

If Congress has provided for the judicial ascertainment of these

questions, then the due process clause of our Constitution has not been violated. Such is the contention of appellee, but it has been held, as stated, that the Interstate Commerce Commission is not a court created in accordance with the provisions of Sections 1 and 2 of Article 3, Constitution of the United States. That being true, appellant is entitled to have the questions presented adjudicated by a court of competent jurisdiction and its rights and interests under the charter of appellee and the laws of the State of Texas in the corporation which it has created, properly determined.

As we view it, the things done by the Interstate Commerce Commission in this case are purely judicial. In *Prentis vs. Atlantic Coast Line*, 211 U. S., 210, Mr. Justice Holmes, writing the opinion, held that certain acts of the State Corporation Commission of Virginia were judicial and others legislative. We quote from the opinion:

“There is no need to rehearse the provisions * * * that add judicial to its other functions, because we shall assume that for some purposes it is a court * * * and in the commonly accepted sense of the word.”

After holding that it has been given powers by the Legislature under the Constitution of Virginia to regulate and control public service corporations and was clothed with the legislative, judicial and executive powers, Mr. Justice Holmes then discussed these powers and observed that such powers can only be granted to one body with the sanction of the Constitution under which the legislative body acts. Defining judicial functions, the justice says:

“A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power * * *.”

"Proceedings legislative in nature are not proceedings in a court, * * * no matter what may be the general or dominant character of the body in which they may take place. The question depends not upon the character of the body but upon the character of the proceeding."

Chief Justice Fuller, concurring in reversing the decree of the lower court, but dissenting from the opinion, observes nevertheless:

"It was made primarily a judicial court of record of limited jurisdiction, possessing also certain special legislative and executive powers. When it proposed to make a change in a rate of public service corporation, or otherwise to prescribe a new regulation therefor, the commission was required, sitting as a court, to issue its process, * * * against the corporation concerned, requiring it to appear before the commission at a certain time and place and show cause, if any it could, why the proposed rate should be prescribed. The judicial question involved on the return to such rule was whether or not the contemplated rate was confiscatory, or otherwise unjust or unreasonable, and in the hearing and disposition of this question the proceedings of the commission as prescribed by law were in every respect the same as those of any other judicial court of record. It issued, executed and enforced its own writs and processes; * * * and kept a complete record and docket of its proceedings; it summoned witnesses and compelled their attendance, and the production of documents; it ruled upon the admissibility of evidence; * * * and its judgments, decrees and orders had the same force and effect as those of any other court of record in the State. * * *."

Justice Harlan dissented from the opinion, but agreed that the proceedings were judicial. The very language of the opinion, in this case, so far as it discusses the judicial attributes of the Virginia Commission, are applicable to the Interstate Commerce Commission since it has assumed the authority, under the Act of

1920, and issued its order, judgment and decree denominated a "Certificate of Public Convenience and Necessity" authorizing the abandonment by appellee of its operation under its charter and the laws of the State of Texas.

In the same manner that the Virginia Commission acted, so the Interstate Commerce Commission, after giving notices as herein stated, appointed a commissioner to hear the evidence and report such evidence to it as to a court. A date for hearing was determined and the party defendant notified. Testimony was taken on the controverted issues and reported to the commission after which the parties at interest were directed to appear, file their brief and make argument upon the law and the facts. Thereafter the opinion was entered upon findings of fact and conclusion of law by the Interstate Commerce Commission, which opinion differs from an ordinary judgment and decree, not in verbiage, not in form, not in effect, but only in the name that is given it, "A Certificate of Public Convenience and Necessity."

In all respects the proceedings, provided by the Act referred to and especially Sections (18) to (22) are judicial. The questions to be determined were matters properly of judicial ascertainment and appellee contends that the "certificate" issued thereunder is a final judgment and decree which can only be attacked by procedure prescribed which is in effect an appeal with trial de novo under the Adjective Law of the United States.

If the acts of the Interstate Commerce Commission, under the section referred to, are judicial, the sections are unconstitutional. This is determined by the matter at issue before them and its nature and not the nature of the Interstate Commerce Commission. The proposition is settled that it is merely a committee from Congress, acting for and in its behalf; that it is not a court and can not exercise judicial functions and though contrary provision be made by Congress, its acts, when judicial in fact may

be attacked in any court in any proceeding because illegal and void. Congress can give the Interstate Commerce Commission no power which it does not have itself. The Interstate Commerce Commission can, therefore, have no power except that which is legislative and administrative in its nature and any act conferring upon it judicial attributes and power is unconstitutional and void and any act which the Interstate Commerce Commission performs or any of its judgments, orders and decrees thereunder are likewise without effect and are illegal and void.

THAT A CHARTER CONTRACT, OR FRANCHISE IS A BINDING OBLIGATION UPON THE CARRIER, UNLESS FOR REASON FOUND DEFECTIVE, IS CONCEDED BY THE DECISIONS OF THIS COURT.

In the recent case of City of San Antonio et al. vs. San Antonio Public Service Company, decided on April 11, 1921, and citing the case of San Antonio Traction Company vs. Altgelt, 200 U. S., 304, a franchise granted to the city of San Antonio was held to be defective as a contract because the city was forbidden, under the Constitution of the State, from entering into such contract. It was, therefore, held to be unilateral. The same process of reasoning followed in this case would conclude in the case at bar that the charter of appellee, granted by the State of Texas, conforming to the Constitution of the State and complying with the statutory laws, is a binding contract. It is binding upon the State of Texas, it is also under the same process of reasoning, binding upon the appellee. If binding upon the appellee, it cannot escape the judgment of the court.

THE STATE CAN CONTROL PHYSICAL PROPERTIES OF ITS CORPORATIONS.

The lawful powers of a State may control the physical properties of its private corporations and make rules and regulations therefor in accordance with the terms of its charter contract, with

its amendments, and the laws of the State which enter into and become a part of such charter contract so long as such action does not become a direct burden on interstate commerce and so long as the exerting of power over its corporations does not prevent or embarrass exercise by Congress of any power with which it is invested by the Constitution. (B. & O. Ry. vs. Maryland, 21 Wallace, 456-473; Northern Securities Co. vs. United States, 193 U. S., 347.)

The Eastern Texas Railroad Company has a charter contract with the State of Texas by which it agreed to operate its line of railroad for a period of twenty-five years, beginning November 1, 1900. The road is situated wholly within the State of Texas and its charter authorized it to do business as a common carrier within the State of Texas and further authorized it to receive freight and passengers from connecting lines without designating whether such freight and passengers should be interstate freight and passengers or not. The charter also adopted all laws that may be passed by the Legislature of the State of Texas in regulating common carriers doing business wholly within the State, and by the terms of such laws they became a part of its charter contract.

At an early day, and before the building of steam railroads, Chief Justice Marshall wrote the opinion in Gibbons vs. Ogden. He recognized then the rights of the State to regulate its internal commerce and this recognition was expressed and repeated in words directly to that effect. This court has ever followed this opinion. So far as we know, no part of it has ever been set aside. It is quoted by appellee with approval. We call attention to the fact that in this opinion the court recognized the right of the State to control the physical properties of carriers within its bounds though they have engaged in interstate commerce. On page 203, in summarizing a mass of legislation not surrendered

to a general government, and which it was observed could be most advantageously exercised by the State itself, the Chief Justice included among them "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State and those with respect to turnpike roads, ferries, etc." What was the relation, at that time, of turnpike roads and ferries to interstate commerce? They are practically extinct at the present day and time and have been superseded by railroads and railroad bridges. No more are the physical properties of the railroad today the instruments of commerce than were turnpike roads and ferries at the time Justice Marshall wrote this opinion. On page 206, asserting the supremacy of Congress to legislate, he limits it "so far as may be necessary to control" State laws, "for the regulation of commerce." On page 208, however, he acknowledges the power of a State to regulate its police, its domestic trade and to govern its own citizens, including of necessity the corporations created by it, which power to regulate gives to the State the power to legislate to a "considerable extent." If to the State is reserved the power to regulate, it must then follow that Congress does not have the power with respect to the same subject to annihilate or exterminate.

It is not the contention of the State of Texas that it can enforce the provisions of this contract when same embarrasses the Federal government in the enforcement of any of its laws passed in accordance with its Constitution and particularly laws in regulation of interstate commerce. It is the position of the State, however, that when the Federal government, acting through Congress or its committee or commission, designated the Interstate Commerce Commission, withdraws the patronage of interstate commerce from the Eastern Texas Railroad, it has reached the limit of its authority. The road ceases to be engaged in interstate commerce and its physical properties are of a nature that it is henceforth beyond

the power of Congress to exercise any influence over it. Congress has no power of extermination. There is no harm in the physical property itself that gives to Congress the power to exterminate it when it has been released from its obligations to the Federal government by the withdrawal from it its privilege of carrying the mail, and receiving interstate passengers and freight. Corporate obligations are in no manner affected, and it must then apply to the State which created it, who alone can give authority for its abandonment.

It is within the conception of practical business men that the carrier, though withdrawing from interstate commerce, may yet serve a useful purpose to its State and comply with the obligations which it assumed to the State creating it. It must, therefore, be a matter of judicial ascertainment before there is an authority who can say the contractual obligations to its State have been performed and such judicial ascertainment must be founded upon the facts properly pleaded before a court of competent jurisdiction created either by the State or by Congress in accordance with its power under the Constitution to create courts.

This court has frequently held and particularly in *Louisville & Nashville Railway Co. vs. Kentucky*, 161 U. S., 677, 702, that it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce so far as the legislation was within its ordinary police power. This case recognized that to the States belong the power to create and to regulate the instruments of such commerce as far as necessary to the conservation of the public interest. It quotes with approval former holdings of the court to the effect that Congress could not limit the power of the States to create corporations, define their purposes, fix the amount of their capital and determine who may buy, own and sell their stock. (Quoted with approval in *Northern Securities Co. vs. United States*, *supra*.)

Would any force be added to this if the court had said that the States have power to fix the time in which the corporations which they create shall live? Is it not true that the Federal government, in the exercise of authority whereby the corporation is destroyed would take from the State, in the self-same act, all the authority conceded to it under its police power to create, fix the purpose, amount of capital and determine who may buy, own and sell the stock of its corporations? Could it not, in the next instant, after the creation by the State of a corporation defeat its action by ordering its destruction and would not such destruction effectively deny to the State all of its other powers of regulation?

That the State has a commerce purely internal, not mixed with interstate commerce and having such limited influence over interstate commerce as to relieve it from the regulation of the Federal government, has been continually recognized by Congress and by all the courts. From the court's opinion in *Northern Securities Co. vs. United States*, *supra* (page 349) we quote this language:

"The regulation or control of purely domestic commerce is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the general government, or any legal enactment of Congress."

Is it conceivable that the State, having a commerce over which it exercises exclusive control, cannot control a corporation engaged in such commerce? Would it not be as reasonable to say that Congress can exclusively regulate the commerce of a nation without any power to regulate the instruments of such commerce, and is it not by the same process of reasoning that Congress is given any power whatever to regulate or control, in any manner, the instruments of interstate commerce? The reasoning applying to one applies also to the other, and it would be fallacious to conclude that the time has arrived, or will arrive, when the State has no commerce except that which is co-mingled with and becomes a part

of interstate commerce; that though it can regulate its intrastate commerce, and though it may create the corporations which are to carry it on and give such corporations life, it cannot determine the number of their years. That its creatures whose purpose is determined by it and whose contracts are recorded in its archives, can, in the exercise of a privilege which it gives also in interstate commerce, abstract from the State all power which it had under it and defeat the State in all of its rights, under the Constitution of the State, under its laws and under the terms of its charter, while the carrier at the same time claims the privileges and immunities which its creator gives. For is it not a proper conclusion that in the event the Federal government directs the abandonment by the carrier of its property, directs its sale and disposition, that it thereby withdraws it from every vestige of power which the State has over it under its police power or authority? The State, in such event, must stand by with folded arms, stripped of every power which the Constitution of the United States guarantees to it and which it has heretofore exercised without dispute from any source and see the creature of its creation exterminated. It is not conceivable that the constitutional provision granting to Congress the power to regulate commerce gives to it such power superior to the guarantee which that same Constitution directly gives to the States ratifying it, and that, through any broadening of the powers under such condition, through judicial interpretation, should the Congress be permitted to annihilate the privileges guaranteed to a State, in the pretense of exercising remotely its authority to regulate commerce. We repeat that there is no contention upon the part of the State of Texas that it has power to endow its corporations with authority to restrain interstate commerce or international commerce to disobey the national will as manifested in legal enactments of Congress, but with this same thought we reassert under a full assurance from the decisions of the courts that when the Interstate Commerce Commission gave

the Eastern Texas Railroad Company its authority to abandon its engagement in interstate commerce, it reached the full power of Congress under the Constitution and the right of the State of Texas to compel the continuance by the defendant, appellee here, of its engagement in intrastate commerce in no manner embarrasses the Congress in the exercise of its legal rights and no further affects interstate commerce than does each and every individual, occupation or profession which produces goods for shipment or demands in any way or furnishes patronage to interstate commerce. It can do no more than produce, at the point of contact with interstate carriers, freight and passengers which may be delivered to them for transportation and which they, under the rules and regulation of the Interstate Commerce Commission may or may not receive. Does not the farmer who raises his products in this vicinity and hauls them to market do as much? To be mentioned also are the manufacturing plants, including saw mills, brick kilns, foundries and other industries at the particular point in question as well as mines and quarries, each producing articles for transportation to be received under the rules and regulation of the Interstate Commerce Commission, because their products are to be transported, and can it be said that they and each of them so affect interstate commerce and, regardless of their nature, they may be regulated or exterminated at the will of Congress or of the Interstate Commerce Commission when so directed by Congress?

Quoting again from the decisions of this court, in *Atlantic Coast Line Co. vs. North Carolina Corporation*, 206 U. S., 1, it was said in the opinion:

“The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject as to their State business to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not

be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Chief Justice White quoted this with approval in *M. P. R. R. Co. vs. Kansas*, 216 U. S., 262, and commenting thereon held that acts of the State in compelling the running of a train within the State by a railroad engaged in interstate commerce, incorporated by another State, that unless for some reason the order must be treated as such an arbitrary and unreasonable exercise as to cause it to be in effect not a regulation but an infringement on the right of ownership or circumstances considered as operating a direct burden upon interstate commerce, the State's order must be complied with, thus holding the action of the State within its police power. Conceive, if you can, the right of a State to force the running of trains by a road within its territory which is incorporated under the laws of another State and, at the same time, this State would be denied the right to enforce the contractual obligation of such carrier to operate trains at all. When we have reconciled this thought with proper reasoning based upon such decisions of our courts, then we may properly concede that Congress has the power claimed by it and exercised by the Interstate Commerce Commission in authorizing and directing the abandonment by the defendant of its operation and the sale and alienation by it of all of its physical properties within the State of Texas.

In the case at bar, we are not left to indulge in uncertain implications for the reason that appellant is protected in all of its contentions by a charter contract whose words are definite, the purport of which appellee makes no effort to deny. There is read into this charter a previously adopted constitution and under it previously enacted statutes.

The contract guarantees the operation of trains on appellee's line of railroad for a period of twenty-five years. That time has not expired. The constitutional statutes referred to forbid the

abandonment of operation by all common carriers without the consent of the State of Texas, regardless of whether this period of time has expired or not. The enforcement of this contract by appellant does not preclude the Interstate Commerce Commission from withdrawing from appellee all patronage of interstate commerce and, therefore, imposes no burden upon interstate commerce. We therefore insist that the power to order the abandonment by appellee of its line of railroad does not lie with Congress nor with the Interstate Commerce Commission.

THE CORPORATE STATUS OF APPELLEES.

In the report of the Interstate Commerce Commission attached to appellees' supplemental motion to dissolve injunction (Exhibit "A," Record, page 53) the Commission found that after the incorporation of the Eastern Texas Railroad all of its outstanding stock was acquired by the St. Louis Southwestern Railway Company, which except for the directors' qualifying shares, still holds it. It further found that there is substantial identity between the officers of the Eastern Texas and the Southwestern, and that the two roads had twice endeavored to consolidate since the stock was purchased by the latter and were prevented from doing so by the refusal of the Texas Legislature to grant its consent, without an extension being made to Crockett, the original destination. This finding is a part of the pleading of appellee and brings us to the conclusion that though the Eastern Texas retains its corporate name, it has lost its corporate identity; that though its obligations to the State of Texas have not been fulfilled, it has nevertheless become a part of the system of the St. Louis Southwestern Railway Company and is subject to all of the laws of the State and of the United States governing it as a part of the system of the St. Louis Southwestern Railway Company.

In substantiation of our views, we refer to the case of Chicago, Milwaukee & St. Paul Ry. Co. vs. Minneapolis Civic and Commer-

cial Association, 247 U. S., 490. Mr. Justice Clark wrote the opinion of the court, and after stating the facts which showed that plaintiffs, two railway companies, had purchased the stock of the Minneapolis Eastern Railway Company and were operating it, electing its directors and shaping its policies, said:

"Thus, the question presented for our decision is whether the Eastern company, in form a corporate entity, separate and distinct from the Milwaukee and Omaha companies, is in reality an independent carrier, exercising an independent control over the road to which it holds legal title and over the conduct of its business affairs, or whether it is a mere agency or instrumentality of the two corporations which own all of its capital stock. * * *

"* * * the Milwaukee and Omaha companies came into exclusive control of the corporation and a board of directors satisfactory to them was elected."

Other facts were found by the court showing that the Eastern company was controlled in all of its policies by the other two railroad companies, who elected the superintendent as well as its directors, the same as is alleged in appellant's bill in the court below. Upon findings the court thereupon announced this legal conclusion:

"With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is, and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it." * * *

The above opinion was concurred in by the entire membership of this court and is the law now. The facts of ownership were similar to the facts of the case at bar and differs only in that

two companies bought its stock, while in the instant case there is but one purchaser which, according to the allegations of appellant and undenied by appellees, operates the company whose stock it purchased as a part of its own system, using the same officers, agents, auditors, superintendent, president and treasurer.

We repeat the words of the justice writing the opinion:

"It is sheer sophistry to argue that because it is technically a separate legal entity, the Eastern (Texas Railroad) Company is an independent public carrier, free in the conduct of its business from the control of the company which owns its capital stock, furnishing its officers and electing its directors."

Standing before the Interstate Commerce Commission, the case was properly the St. Louis Southwestern Railway Company applying for a certificate of public convenience and necessity authorizing it to abandon operation of a part of its main line track and dismantle and dispose of same.

CANNOT ABANDON PART OF LINE.

The Interstate Commerce Commission has no authority under the statute to grant to a railroad company a certificate of public convenience and necessity authorizing it to abandon a part of its main line track in the absence of a showing that the entire system was losing money. Appellant pleaded this fact in the court below (Plaintiff's Supplemental Petition, Record, page 11), but the testimony on this plea was refused by the trial court.

The Puget Sound Traction Co. vs. Reynolds et al., 241 U. S. 574, is a case in which a street railway company had acquired the capital stock and control of three other systems. The company sought to charge separate fares on the different sections of its system, being that which had been purchased by it and brought under its management. The proceeding was to compel it to grant transfers from its main line to its purchased lines, or either of

them, and the company alleged a loss on the business of each of its three branch lines and pleaded a violation of the Fourteenth Amendment declaring that to require it to give transfers would be a confiscation of its property in violation of this amendment. The court declined to consider each company separately, but declared all of them to constitute one system, and, in determining the plea of appellant, defendant below, the earnings of the entire system was inquired into. Mr. Justice Pitney, writing the opinion of the court, said:

“But we cannot accede to the suggestion that the question whether the Commission’s order is confiscatory or otherwise arbitrary within the inhibition of the Fourteenth Amendment is to be determined with reference alone to the Alki, the Fauntleroy or the Ballard Beach Lines. These are and long have been operated by plaintiffs as parts of a system comprising two hundred miles of tracks.”

The court, in this case, merely followed former decisions, and its decisions in this and other cases have been closely adhered to by the States. In view of the pleadings of appellant in its amended bill and of the answer of appellee and particularly in its exhibit referred to above, we submit that the doctrine above stated applies.

The Eastern Texas Railroad has become the mere agent or instrumentality of the St. Louis Southwestern Railway Company and the Interstate Commerce Commission is without authority of law to issue the certificate of public convenience and necessity authorizing its abandonment in the absence of a showing that the entire system is losing money, and that the abandonment by it of the sections of the system in question would relieve its distressed condition.

GENERAL SUMMARY.

APPELLANT'S ASSIGNMENT OF ERROR No. I.

In the light of proper construction of the statute and placing upon same the proper interpretation; in view of the admitted facts in appellees' pleading and the charter contract with the State of Texas; in view of the corporate status of appellee and its association as part of the system of the St. Louis Southwestern Railway Company; and considering the police power reserved to the State to control the physical properties of its corporations, appellant's assignment of error No. I should be sustained.

APPELLANT'S ASSIGNMENT OF ERROR No. II.

Appellant, plaintiff below, having brought this suit on substantial issues, defendant could not thereafter create its defense by producing the order from the Interstate Commerce Commission and upon same move the dissolution of the injunction. Being in court upon substantial issues, appellant was entitled to be heard and to attack the certificate collaterally as illegal, unconstitutional and void for the reason and upon the grounds herein discussed. Appellant was, therefore, entitled to be heard on the facts attacking the findings of the Interstate Commerce Commission upon which it issued its certificate as a basis for its allegation that the certificate was contrary to law. Appellant's assignment of error No. II should be sustained.

APPELLANT'S ASSIGNMENT OF ERROR No. III.

For the reason that Congress has no authority to pass an act taking from the State its right to control the physical properties of its corporations in the absence of a conflict between such con-

trol by the State and the rights of Congress under the Constitution; and for the reason that the interpretation of Subdivisions (18), (19), (20) and (21) of Section 1 of the Act of February 28, 1920, giving the Interstate Commerce Commission authority to order the abandonment of railroads, makes that body a judicial tribunal without being constituted in accordance with the Constitution, the sections of the act are unconstitutional and any orders made in pursuance thereof are illegal, unconstitutional and void. For this reason appellant's assignment of error No. III should be sustained.

APPELLANT'S ASSIGNMENT OF ERROR No. IV.

For the reason stated in the argument and because Congress did not intend to give the Interstate Commerce Commission the power exercised, as shown by the wording of the act interpreted in the light of other acts of Congress, the court erred in holding that the Interstate Commerce Commission had authority, under the law, even though it be constitutional, to issue the certificate of public convenience and necessity alleged and, therefore, appellant's assignment of error No. IV should be sustained.

CONCLUSION.

The decree of the district court dissolving the injunction should be reversed and an order should be entered upon the admissions in appellee's answer perpetuating the injunction granted by the district court for the Fifty-third Judicial District of Texas.

In the alternative, and in the event the court should find it has no authority to perpetuate the injunction upon the pleadings in the case, the decree of the district court should be reversed and the temporary injunction granted by the district court for the Fifty-third Judicial District of Texas should be reinstated pending a hearing and the district court directed to hear the case

upon the pleadings without consideration for the order of the Interstate Commerce Commission directing the abandonment of appellee's line of railway.

C. M. Clegg, Jr.
C. M. Clegg, Jr.

Attorney General,

Bruce W. Bryant
Bruce W. Bryant

Wallace Hawkins
Wallace Hawkins

Tom L. Beauchamp
Tom L. Beauchamp
Assistant Attorneys General,

Solicitors for Appellant.

Austin, Texas, September 17, 1921.

1/2
To the Supreme Court of the United States

OCTOBER TERM, 1891.

In Equity No. **298**

THE STATE OF TEXAS, Appellant,

vs.

EAST TEXAS RAILROAD COMPANY, ET AL.

Appellees.

Transcript from the Supreme Court of the United States
for the Western District of Texas.

BUFILE OF APPELLANT.

H. C. BROWN & CO.

DANIEL C. HARRIS,

R. J. HANFORD,

Solicitors for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1921.

In Equity No. 870.

THE STATE OF TEXAS, Appellant,

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL.,
Appellees.

**Appeal from the District Court of the United States
for the Western District of Texas.**

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

For the purpose of simplifying and correcting the statement in appellant's brief.

The Eastern Texas Railroad Company was incorporated under the general railway corporate laws of the State of Texas, November 8, 1900, and is 30.3 miles long and extends from Lufkin, in Angelina County, Texas, to Kennard in Houston County, Texas. At Lufkin it connects with the St. Louis Southwestern Railway Company of Texas and the Houston, East & West Texas Railway, besides some small lumber roads. It was promoted and financed by individuals interested in the Texas & Louisiana Lumber Company, which lumber company owned about 116,000 acres of pine timber

lands in the vicinity of Kennard. The construction of the line of railway enabled the lumber company to build at Ratcliff, within three miles of Kennard, one of the largest saw mill plants in the south. By organizing a railway and constructing a line of road, the owner of this pine timber was able to reach the markets with its lumber and forest products and secured for the railway a division of the through rate. The other traffic in the territory was wholly insufficient to justify the construction of a railway, but it being a common carrier, it was necessary for the railway to transport such other traffic as was tendered. Upon the completion of the line of railway, it was valued by the Railroad Commission of Texas, and the company authorized to issue \$454,500 capital stock as representing the value of the property. There has never been any mortgage or bonded indebtedness on the property.

In connection with the main line, there was constructed several miles of tram tracks by this company through the timber, and on August 28, 1906, the railroad company sold its tram tracks, current assets and rolling stock, all of which had a book value of \$94,604.94, to the lumber company. This sale was made in contemplation of the sale of the capital stock of the railroad to the St. Louis Southwestern Railway Company, a Missouri corporation, and one of the appellees herein. The capital stock was so sold, and paid for by the St. Louis Southwestern Railway Com-

pany with its bonds, payment being on the basis of par value of the capital stock \$454,500, and since such sale the officers of the Eastern Texas Railroad Company, the St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas have been practically the same, but the three companies have been operated independently. The Eastern Texas Railroad Company has twice applied to the Legislature of the State of Texas for authority to consolidate its property with the St. Louis Southwestern Railway Company of Texas, but has been unable to secure authority to do so.

In 1917, the timber of the lumber company being practically cut out, it dismantled and removed its mill plant and buildings from Ratcliff. Up to the time of the removal of this mill, the railroad company had paid operating expenses, but since that date its income has declined, so that it has had an increasing deficit. The financial condition of the country became such that on June 3, 1920, the appellee, Eastern Texas Railroad Company, made application to the Interstate Commerce Commission under the provisions of paragraphs 18, 19, 20 and 21 of Section 1 of the Act to regulate commerce, as amended by the Transportation Act of 1920, for a certificate of Public Convenience and necessity, authorizing appellee, Eastern Texas Railroad Company, to abandon the operation of said railway and dismantle and remove its entire line and dispose of the salvage. Copy of this application is con-

tained in the transcript, page 28. Thereafter, on July 19, 1920, appellant, the State of Texas, filed in the State District Court at Austin, Texas, a bill of complaint praying for an injunction enjoining the Eastern Texas Railroad Company from abandoning the operation of its trains and dismantling its road (Tr. pp. 1-7). The injunction was granted, as prayed for, by Geo. Calhoun, Judge of said State Court, on the 9th day of July, 1920 (Tr. p. 44).

Thereupon defendants in said cause, on October 4, 1920, filed a petition for removal to the United States District Court for the Western District of Texas (Tr. pp. 36-41), and executed bond for removal in due form (Tr. pp. 41-42). The Judge of the State Court on the 19th day of October, 1920, entered an order removing the case to the United States District Court, as prayed for (Tr. p. 43). Injunctions had been issued and duly served on the defendants (appellees herein) (Tr. pp. 43-49). In the United States Court defendants filed their original answer November 15, 1920, setting up their defenses to the bill of complaint (Tr. pp. 20-33), and on December 18, 1920, appellees filed their supplemental answer, pleading the issuance by the Interstate Commerce Commission on December 2, 1920, of a certificate of public convenience and necessity, authorizing the Eastern Texas Railroad Company to abandon its lines of railway between Lufkin, Texas, and Kennard, Texas, and dismantle and remove same (Tr. pp. 33-35).

Thereafter, on January 15, 1921, appellant, State of Texas, filed its supplemental bill of complaint in reply to the original and supplemental answers of appellees.

The cause thus being at issue on bill and answer, appellees, on December 8, 1920, filed in the United States District Court a motion to dissolve the temporary writ of injunction (Tr. pp. 50-51), and on March 15, 1921, filed a supplemental motion to dissolve the injunction (Tr. p. 52). The case thereupon came on to be heard before Judge Duvall West, Judge of the Western District of Texas, on motions to dissolve and on the merits.

Appellant asked permission to offer testimony showing that the action of the Interstate Commerce Commission in granting the certificate of public convenience and necessity was not authorized by the facts. On objections made by appellees, the Court held that this testimony was not admissible, to which appellant excepted. After full hearing the Court made an order sustaining the motion to dissolve and entered judgment in favor of appellees. (See opinion of the Court, Tr. pp. 60-62, and judgment of the Court, Tr. pp. 63-64, from which action of the Court the appellant appealed in due form to this Court, and assigned error as shown in transcript, pages 65-66.)

QUESTIONS OF LAW.

We conclude from the record and the brief of

appellant that the questions of law presented herein may be stated as follows:

1. Has Congress the power to authorize a railway company, incorporated under the general laws of a state and owning and operating a line of railway wholly within such state, which railway is engaged in transporting commodities of commerce, both intrastate and interstate, to abandon the operation of its railway and dismantle and remove the same, where the laws of the state prohibit such abandonment and removal?
2. Does the Transportation Act of 1920 authorize a carrier by railroad to abandon the operation of its lines and salvage its track upon the granting of a certificate of public convenience and necessity by the Interstate Commerce Commission without the approval of the state authorities?
3. Were the conclusions of fact found and reported by the Interstate Commerce Commission conclusive upon the District Court of the Western District of Texas, or should that Court have opened up the case on the facts and heard evidence contradicting the conclusions reached by the commission?

POWER OF CONGRESS.

We submit that the power to regulate interstate commerce conferred upon Congress by the Constitution of the United States is amply sufficient to authorize Congress to enact the provisions contained in paragraphs 18, 19, 20 and 21 of Section 402 of the

Transportation Act of 1920. The people of the United States originally possessed the power to regulate commerce, limited only by the unalienable rights of its citizens.

When the people determined to ordain and establish the Constitution and Government of the United States, they divided this power which they possessed to regulate commerce into two grand divisions; by Section 8 of Article 1 of the Constitution they conferred upon Congress the power to regulate commerce with foreign nations and among the several states, and with the Indian tribes; this power so conferred was limited only by the provisions of the Constitution and the unalienable rights of the people.

The power to regulate intrastate commerce remained with the states and the people thereof.

To prevent a conflict in the exercise of the power conferred upon Congress and the power remaining with the states, it was provided by the second paragraph of Article 6 of the Constitution of the United States as follows:

"This Constitution, and laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

In order to grasp the full force and effect of this

provision, it must be kept in mind that the Constitution was ordained and established by "We, the people of the United States"; thereby making the above paragraph the act and declaration of each citizen of the United States. Therefore, to understand the power conferred upon Congress, it is only necessary to understand what is meant by the words "to regulate commerce". It will be admitted without controversy, that "commerce" embraces all the instrumentalities used in conducting commerce with foreign nations and among the several states.

It will also be admitted that a corporation organized under the laws of a state, and authorized by such laws to engage in transporting commerce, state and interstate, becomes and is an instrumentality of commerce with foreign nations and among the several states, and as such instrumentality is subject to be regulated by Congress.

Does the power to regulate include the power to authorize the abandonment and dismantling of an instrumentality of commerce when the public convenience and necessity will permit?

It would seem conclusive that the governmental power to authorize the creation of one instrumentality or to permit the use of an instrumentality in commerce, would embrace the power to permit the stoppage of such use. It will surely follow that when an instrumentality is no longer used in commerce, then the governmental power to permit the dismantling of

the same, and the salvage of the materials therein contained, would of necessity exist. We do not understand that the appellant seriously questions these conclusions, and suit is based largely on the contention that the Eastern Texas Railroad Company did not procure the consent of the State to the dismantling and removal of its line of railway.

Appellant holds that the State has authority to grant this permission to abandon and salvage an instrumentality of commerce. If the State has the power, by reason of its power to regulate commerce (intra-state), then why hasn't Congress the power to permit such dismantling and salvage where Congress possesses power to regulate commerce (interstate)?

The State's position is, as we understand it, that Congress hasn't this power, because Congress did not authorize the creation of the instrumentality. We submit that this contention is not tenable. When the Government of the United States was established, commerce was not divided; it was the power to regulate commerce that was decided and distributed between the United States and the several states. Persons engaged in commerce proceeded to conduct their commercial dealings just as they had done before, except they were required to comply with the regulations, state and federal. Instrumentalities of commerce were created and used, sometimes by the authority of the State, and sometimes by the authority of the United States. Again, the instrumentalities were created and

used in commerce, both state and interstate, without the authority of either the State or the United States. In other words, the authority by which an instrumentality is created, as in the case of a corporation authorized to construct a railroad, had no real bearing or effect on the right of the State, or of the United States to regulate the commerce conducted by the aid of such instrumentality. Where such instrumentality is constructed by the State, and subsequent thereto Congress decides that the public convenience and necessity requires its removal, Congress has the power to authorize the dismantling of such instrumentality without the consent of the State.

WATER TRANSPORTATION—AUTHORITIES AND ARGUMENT.

The leading case upon this question is *Gibbons vs. Ogden*, 9 Wheaton, page 1, 6 L. Ed. 23. That case involved the constitutionality of an Act of the Legislature of the State of New York granting to Robert R. Livingston and Robert Fulton exclusive rights to navigate the waters within the jurisdiction of the State of New York by boats propelled by steam power, and the conflict of said Act of the State of New York with the laws of the United States passed by Congress governing coasting trade. Chief Justice Marshall delivered the opinion of the court, and on the question of the grant of power to Congress to regulate commerce, at page 196 L. Ed. 70, said:

"We are now arriving at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

At pages 210 and 211, 6 L. Ed. 73, in discussing the contention "that if a law, passed by a state in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance

of the Constitution, they affect the subject, and each other like opposing powers," the Chief Justice added:

"But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law."

And after further discussion, says:

"In every such case the Act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Mr. Justice Johnson, in a concurring opinion in *Gibbons vs. Ogden*, at page 227, 6 L. Ed. 77, said:

"The 'power to regulate commerce', here meant to be granted, was that power to regulate commerce which previously existed in the states. But what was that power? The states were, unquestionably, supreme, and each possessed that power over commerce which is acknowledged to reside in every sovereign state, ***

"The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power

carries with it the whole subject, leaving nothing for the state to act upon."

The power of Congress in the regulation of interstate and foreign commerce was tersely expressed in the case of *Sinnott vs. Davenport*, 22 Howard 227, 16 L. Ed. 247, wherein the Court say:

"The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State Legislature derived its enactment.

"This paramount authority of the Act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the states. They surrendered this power to the general government; and to the extent of the fair exercise of it by Congress, the Act must be supreme."

Again, on the power of Congress in regulating interstate and foreign commerce, the Supreme Court in construing the Act admitting the State of Oregon, in the case of *Willamette Iron & Bridge Company vs. Hatch*,

125 U. S. page 1, 31 L. Ed. 629, said at page 12,
L. Ed. 633:

"We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the states have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the states, or the individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose."

That part of the above quotation with reference to Congress not being concluded by anything that the State, or that individuals by its authority or acquiescence, have done, when Congress assumes control of the matter, is peculiarly applicable to the case at bar, as the State of Texas had prohibited the removal of a main line of railway prior to the passage of the Transportation Act of 1920.

The construction of the Constitution announced in the foregoing cases has been uniformly followed by the Federal Courts in all cases referring to transportation by water. We deem it unnecessary to enumerate the cases or the Acts of Congress construed therein.

We refer, however, to the case of Union Bridge Company vs. United States, 204 U. S. page 364, 51 L. Ed. 523. This was a case where the bridge company had constructed a toll bridge over the Alleghany River at Pittsburg, under a charter granted by the State of Pennsylvania. It is apparent that the toll bridge was used in intrastate commerce, and the rights of the company under the State charter were the same as the rights of the Eastern Texas Railroad Company under the laws of Texas and its charter; therefore, the same principles were involved in that case as in the case at bar. The State had authorized the construction of, and its people were using the bridge for intrastate business; and the bridge company was deriving revenue therefrom. Complaint was made that this use by the State authority was a burden upon and obstructed the use of the river for interstate commerce. Under the provisions of the Act of Congress this complaint was made to the Secretary of War, who was authorized by the Act of Congress to hear the matter and order any obstruction removed. Secretary Root first acted in the matter, and subsequently Secretary Taft. The order was made and the bridge company refused to obey it. Thereupon, under the Act of Congress criminal proceedings were instituted against the bridge company and a fine of \$5,000 was assessed for such failure to obey the order; this fine was made a continuing fine at the rate of \$5,000 per month. The case was appealed to the Supreme Court of the United

States by the bridge company. After reviewing the authorities and facts, Justice Harlan, speaking for the court, at page 400, 51 L. Ed. 539, said:

"There are no circumstances connected with the original construction of the bridge, or with its maintenance since, which so tie the hands of the government that it cannot exert its full power to protect the freedom of navigation against obstructions. Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been as unreasonable, obstruction to commerce and navigation, as then carried on, it must be taken, under the cases cited, and upon principle, not only that the company, when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navi-

gation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the water ways of the United States, cannot have the effect to cast upon the government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the bridge company contends would seriously impair the exercise of the beneficent power of the government to secure the free and unobstructed navigation of the water ways of the United States. We cannot give our assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all water ways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a water way of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made."

RAILROAD TRANSPORTATION—AUTHORITIES AND ARGUMENT.

The cases cited are authority for the proposition

that the power of Congress to regulate commerce cannot be limited by the Acts of a State or a corporation chartered under the authority of a State; which means the contract between the State and the corporation is subject to the power of Congress, and was so subject at the time the charter was granted by the State.

The construction of railroads in this country, and the transportation of commerce by means of railroads, was commenced without any legislation, either State or Federal. In its earliest stages the various states authorized the formation of corporations for the construction of railroads; and under State authority railroads were largely developed. As their importance in commerce became more and more manifest, their regulation by the states was gradually developed. Finally, when Congress determined that the public interest required their regulation by that body, it entered the field and began the exercise of its powers.

ACT TO REGULATE COMMERCE.

The first great step taken by Congress in this regulation was the passage of the Act to regulate commerce, which was approved February 4, 1887 (24th Statutes at Large 379), and was amended from time to time down to and including the Act of August 10, 1917 (40th Statutes at Large 272).

There has been much litigation under this Act to regulate commerce, and the amendments thereof. It is unnecessary to follow the development of the con-

struction of this Act by the various decisions of the Federal Courts. For the purpose of this caes it is sufficient to refer to the review of these decisions contained in the case of *Mondou vs. New York N. H. & H. R. Co.*, 223 U. S. page 1, 56 L. Ed. 327, in which case Mr. Justice Van Devanter, at page 746, 56 L. Ed. 344, stated the power of Congress with reference to railroads as follows:

"The clauses in the Constitution (Art. 1, par. 8, clauses 3 and 18) which confer upon Congress the power 'to regulate commerce *** among the several states', and 'to make all laws which shall be necessary and proper for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

"1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land. ***

"3. 'To regulate', in the sense intended is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

"4. This power over commerce among the states so conferred upon Congress is completely in itself, extends incidentally to every instrument and agent

by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce."

This was one of the employers' liability cases, and after the above quotation and the citation of many authorities, Justice Van Devanter said, quoting from the brief of the Solicitor General:

"Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the Interstate Commerce Act." (Previously he had defined commerce as an act.)

The Justice thereupon holds that the Act under consideration was within the power of Congress, and passing to the question which has already been presented, as to whether or not the Employers' Liability Act superseded the State Constitution and Laws, he quotes from the opinion of Chief Justice Marshall in *McCullough vs. Maryland*, 4 Wheaton 316, 4 L. Ed. 579, closing with the following paragraph quoted from page 426:

"This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them."

The Mondou case was followed by the case of Houston, East & West Texas Railway et al. vs. United States, 234 U. S. page 342, 58 L. Ed. 1341. This was a case in which the Interstate Commerce Commission had an order authorizing the railroad companies involved to increase their intrastate rates in the State of Texas, so as to eliminate and prevent discrimination against rates for interstate transportation. In delivering the opinion, Mr. Justice Hughes, at page 1347, among other things, said:

"The invalidity of the order in this aspect is challenged upon two grounds:

"(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

"(2) That, if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the commission exceeded the limits of the authority which has been conferred upon it.

"First. It is unnecessary to repeat what has frequently been said by this Court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this

power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrences of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating legislation'. By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons vs. Ogden*, 9 Wheat. 1, 196, 224; *Brown vs. Maryland*, 12 Wheat. 419, 446; *County of Mobile vs. Kimball*, 102 U. S. 691, 696, 697; *Smith vs. Alabama*, 124 U. S. 465, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

"Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wal. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile vs. Kimball*, *supra*); 'to foster, protect, control and restrain' (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the

control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad vs. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co. vs. United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, *supra*, pp. 48, 57; *Interstate Commerce Commission vs. Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate Cases*, *supra*, p. 431;

Illinois Central Railroad Co. vs. Behrens, decided April 27, 1914."

TRANSPORTATION ACT, 1920.

Congress passed the Transportation Act after a great deal of labor and investigation. It is a fact well known that Congress, in this investigation, went fully into the decisions of this Court bearing upon the subjects embraced in the Transportation Act. The extent of the power of Congress was fully considered by that body, and the conclusions reached as to the extent of that power, so far as exercised in the Transportation Act, are worthy of the most careful consideration. The United States was then in control of the entire railroad system of the country and had been for a period of two years. The United States Government had become familiar with the necessities of the railroads. It had also had an opportunity to observe what regulations should be enforced by Congress so as to properly protect interstate and foreign commerce. This protection necessarily included the question of any regulations by the states that impeded or burdened or interfered with the free flow of interstate or foreign commerce. This was emphasized by the fact that in the Transportation Act, Congress contemplated aiding interstate commerce by an arrangement whereby the Government of the United States would, in a limited way, lend its credit to the railroad companies of the country, under the supervision of the Interstate Commerce Commission.

For this reason, the matter of extensions of existing lines of railroad became of paramount importance in the enactment of the Transportation Act. Thereupon Congress determined that it would regulate such extensions, and the exercise of this power by Congress is not challenged by the appellant in this cause.

It was inevitable, when the subject of extension was considered by Congress, that the subject of abandonment of railroads that should not be operated would present itself. It could not be ignored for the reason that interstate commerce should not be burdened by the expense of operating railroads where the public necessity and convenience would permit their abandonment. Therefore, Congress embraced within the Transportation Act provisions regulating the extension and abandonment of railroads. These provisions were made as an amendment to Section 1 of the Act to Regulate Commerce, and are contained in paragraphs (18) to (21) inclusive, and are as follows:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line or railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will

require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the Governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described

in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a

common carriers its car service as that term is used in this act, and to extend its line or lines; provided, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

CONSTRUCTION OF PARAGRAPH TWENTY

With reference to these provisions, the appellant, in its brief, beginning at page 11, contends that Congress did not mean what it said in that portion of paragraph (20) above quoted, which is as follows:

"From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approved other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby."

In other words, the appellant contends that the above quotation means that the Eastern Texas Rail-

road Company could proceed with the abandonment in this case without applying to the Federal Government for further approval; but does not mean that it could proceed without the approval of the State.

The first objection to this construction of this language by appellant is that, if appellant is correct, the provision last quoted would be wholly unnecessary. These paragraphs provide for an application to the Commission for the right to abandon a line of railroad. The form of this application is left to the Commission, but the Commission is required, when such application is filed, to give notice of the filing of the same; one of these notices to be filed with the Governor of the State in which the railroad which the carrier desires to abandon is situated. This requirement, of course, was intended to inform the State authorities that a carrier by railroad, situated within the State, was asking permission to abandon the operation of such railroad; thereby giving the authorities of the State opportunity to take such action as they might deem proper. In addition to this notice to be filed in the office of the Governor, a notice was required to be published in a newspaper of general circulation in each county in or through which the line of railroad was operated; so that any party interested in the subject could appear at the hearing. Now, the certificate to be applied for was "a certificate that the present or future public convenience and necessity permit of such abandonment". In these paragraphs the Commission was au-

thorized to issue this certificate with such conditions attached as, in its judgment, public convenience and necessity required.

When this was done and the conditions contained therein complied with, then Congress declared that the carrier by railroad might "without securing approval other than such certificate", proceed with the abandonment of the railroad described.

Keeping in mind that Congress is the supreme power in the regulation and control of the instrumentalities used in interstate commerce, we submit, without fear of successful contradiction, that Congress intended that the right might be exercised without the approval of any other authority whatsoever. It would have been a use of unnecessary words to have added the words "State or Federal"; because both the State and the Federal Government were embraced in the language used by Congress as well as all other authorities existent in the world.

However, appellant supports its contention by referring to paragraph (17) of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act. That paragraph relates to the provisions of the Act regulating matters of equipment, car shortage, etc., and requires compliance by carriers with the orders of the Commission with reference to the subjects referred to, and makes a failure to comply, an offense, and prescribes a penalty therefor. After making these provisions, Congress then put a proviso upon

said paragraph (17), and enacted that the provisions made should not interfere with the right of the State to exercise its police power on the same subject. In the interest of clarity, this was necessary. Appellant then, in its brief, on page 15, refers to Section 15 of the Federal Control Act, which section is simply an explanation by Congress that it is not intended that the Federal Control Act should affect laws of the State with reference to taxes and other subjects mentioned. This declaration of Congress supports our position, because it indicates that Congress was afraid the Federal Control Act would interfere with the laws referred to, unless such laws were expressly exempt from the effect of the Federal Control Act.

In the Case of Johnson vs. Southern Pacific Company, 196 U. S. page 1, 49 L. Ed. 363, the Court passed upon the construction of the Safety Appliance Act. Chief Justice Fuller delivering the opinion of the court, beginning at page 14, L. Ed. 368, laid down the general rule for construing acts of this character, and at page 18, L. Ed. 370, quoted and adopted the following general rule:

"In short it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

Following this rule and taking the entire Transpor-

tation Act, it is apparent that where Congress took jurisdiction of the subject matter, by the provisions of the Act, it was the intention of Congress to make its action, or the action authorized complete in itself, unless it expressly limited the same.

In the case of Houston East & West Texas Ry. Co. vs. United States, 234 U. S. 342, 58 L. Ed. 1341, Mr. Justice Hughes delivering the opinion of the court, and passing upon the construction of the provisions giving power to the Interstate Commerce Commission to prevent discriminations, held that the authority applied to a discrimination made by rates established under state authority, although the Act of Congress did not so declare. Referring to the Act to regulate commerce, at page 356-7, L. Ed. 1350, he showed that this Act on its face provided that it is not to extend to purely intra-state traffic, referring to the Minnesota rate case, where there had been no finding by the Commission that the rates involved were discriminatory. Then referring to the case at bar, he said:

"Here, the Commission expressly found that unjust discrimination existing under substantially similar conditions of transportation, and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in paragraph 1 does not apply to a case of this sort. The Commission was dealing with the regulation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of

transportation that was 'wholly within one state.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one which Congress alone competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised, and that the subject was thus left without governmental regulation."

We conclude, therefore, under the authority of these cases that the words "without other approval than such certificate" excluded the authority of the state; and we also conclude that if these words had been omitted, the authority from the Commission to abandon the road would not have been impaired.

DO PARAGRAPHS 18, 19, 20 and 21 CONFER JUDICIAL AUTHORITY UPON THE COMMISSION?

Appellant in its brief, beginning at page 17, contends that they do; appellees deny this contention.

The contention of Appellant is based on the provision that when an application is filed before the Commission, it is required to give notice, and the

parties objecting to the granting of the Application are authorized to appear and contest the same at a Hearing before the Commission; and that the Commission after such hearing, is authorized to issue a certificate that the present or future public convenience or necessity permit of such abandonment. The power conferred upon the Commission is contained principally in paragraph 20, where it is declared the Commission shall have power to issue such certificate as prayed for, etc.

We submit that the power conferred is not the exercise of a judicial function, but is the granting of a permit, a license, and certificate to one of a class of persons whom Congress has declared have the right to such license, permit or certificate, when it is ascertained that they come within such class. The granting of such certificate is, therefore, an administrative act by an agency authorized by Congress to grant the same, upon the ascertainment that the conditions named exist.

The conditions on which such certificates is to be granted are political in their nature. It is the public convenience and necessity which is to be ascertained; and the question to be determined is, does the public convenience and necessity permit the exercise of the power, and the issuance of the certificate to the carrier by railroad. Congress has the power to determine what are the conveniences to which the public are entitled and the necessities which the public require; it has the power to determine when such convenience and necessity

of the public will or will not permit the doing of a certain act, and it may ascertain such public convenience and necessity in such manner and by such means as it deems appropriate.

In the paragraphs quoted Congress has provided the method and means by which the public convenience and necessity should be ascertained, and has provided that when they permitted the abandonment of a railroad, a certificate to that effect should be issued. When the method prescribed by Congress has been followed, and a certificate issued the conclusions reached by its designated agency forecloses the matter, so far as the judicial branch of the government is concerned; for the reason that the questions of public convenience and necessity are legislative in their nature, when they refer to present and future requirements.

Paragraphs of the Transportation Act under consideration have reference to what is now required by the public and what the future requirements will be; and the question that Congress was determining and upon which it authorized a hearing by the Commission was whether or not such requirements would permit the abandonment of a railroad. The past was not involved, excepting in so far as it was necessary to investigate past conditions so as to properly ascertain and determine present and future conditions.

Appellant lays particular stress upon the announcements of this court made in the case of *Prentis vs. Atlantic Coast Line Company*, 211 U. S. 226-7, 53 L. Ed.

158-9. We find nothing in this case which contravenes the idea above suggested; on the contrary the case sustains our contention. This court, among other things, says:

"Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. Stat. 720, no matter what may be the general or dominant character of the body in which they may take place. * * *

That question depends not upon the character of the body, but upon the character of the proceedings. * * * And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up."

Appellees' contention that the granting of permission to abandon a railway is legislative, and not a judicial act, is supported by authority of the State of Texas itself.

The Legislature of the State of Texas granted to the Texas, Arkansas & Louisiana Railway Company permission to take up its railroad tracks constructed between the town of Atlanta and Bloomburg, Texas, both in Cass County, a distance of eight or nine miles, and all switches, sidings, etc., and to remove all other kinds of material, equipment and sell and dispose of the same by an act of the Legislature passed and approved March

17, 1919, General Laws State of Texas Thirty Sixth Legislature, Regular Session 1919, page 130. In the second section of said Act, page 131, the Legislature found as a fact that the railroad company was not able to pay its operating expenses, that its track was in a dangerous condition for use, the engine owned was not safe to run, the road could not serve the public in any way in its present condition, the material was deteriorating and would become a total loss unless relief was granted, and that these facts, and the crowded condition of the legislative calendar created an emergency for the passage of the law.

Surely it would have been just as proper a legislative act for the Legislature to have referred the matter to the Railroad Commission of Texas to find these facts and to issue a certificate as it would have been to have passed the act referred to.

At the same session of the Legislature of the State of Texas a similar Act was passed, by the first section of which the Riviera Beach & Western Railway Company, its successors and assignees, was given permission "to take up and move its entire line of railway, including all rails, ties, angle bars, track fastenings, switches, sidings, signs, turnouts, wyes, depots, water and fuel stations and all other material and equipment belonging to said Company, including the line of railway from the station of Riviera, where the said Riviera Beach & Western Railway Company connects with the line of road of the St. Louis, Brownsville & Mexican

Railway Company to the eastern terminus of said line at Riviera Beach, a distance of approximately ten (10) miles, and to sell or dispose of all said material, including said Company's lands and rolling stock in such manner as it may see fit, and to abandon all of its tracks and line of railroad."

By the second section of said Act the Railroad Corporation was permitted to dissolve.

By the Third section, it was found by the Legislature that "The fact that the said Riviera Beach & Western Railroad Company has never been able to pay its operating expenses, and the fact that a line of railroad between Riviera and Riviera Beach is not required to serve the public interest, and the further fact that its track and equipment is rapidly deteriorating will soon become a total loss to its owners, creates an emergency and an imperative necessity which requires that the constitutional rule providing that bills be read on three several days be suspended and etc."

This Act is contained in the same volume, Sheet Acts General Law of the State at pages 39 and 40.

The same session of the Legislature of Texas passed a similar Act granting permission to the Texas South-eastern Railway, its successors and assigns, to take up and remove its line of railway from the station of Vair, where it connected with the line of railway of the Gruetton, Lufkin & Northern Railway Company, to the station of Neff, a distance of 7.7 miles; and by the second section of said Act, the Legislature found practically

the same facts as were found in the two foregoing Acts. See General Laws State of Texas, Sheet Acts 1919, Thirty Sixth Legislature, page 96.

A similar Act was passed permitting the Artesian Belt Railroad to take up its tracks in Bexar County, Texas, and the same facts found, which Act is contained in the same General Laws of the State of Texas, Sheet Acts 1919, page 115.

However, we do not wish to be understood as saying that Congress cannot confer upon the Interstate Commerce Commission power to ascertain any fact and make any order necessary to carry into effect the powers conferred upon Congress, whether such finding is similar to the action of a court or not.

CONTRACT IN CHARTER WITH THE STATE AND THE CONTROL OF PHYSICAL PROPERTY OF CORPORATIONS.

Appellant insists that the Constitution and Laws of the State became a part of the Charter contract between the Eastern Texas Railroad Company and the State of Texas. If this be admitted, it will then follow that the Constitution of the United States and laws passed by Congress in pursuance thereof, also become a part of the charter of such railway Company; thereby there will be engrafted on the contract between the State and the Railway Company the provisions of the Constitution of the United States authorizing Congress to regulate commerce among the States, and the provision of said Constitution making the regulations by

Congress paramount to the Constitution and laws of the State. This alone would justify the opinion and judgment of the Trial Court in this cause; because Congress had passed the paragraphs of the Transportation Act heretofore set out; this was a legislative act regulating commerce and is conclusive on all parties, including the State of Texas.

Appellant seems, however, to rely upon the case of Northern Securities Company vs. United States, 193 U. S. 333, 48 L. Ed. 679, but that case does not sustain the views of Appellant. In the opinion in that case, this court said, at page 333, L. Ed. 698:

"An act of Congress constitutionally passed under its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. Cohen vs. Virginia, 6 Wheat 264, 385, 414, 5 L. Ed. 257, 286, 293. These views have been often expressed by this court."

Appellant refers also to the case of L. & N. Railway Company vs. Kentucky, 161 U. S. 699, 40 L. Ed. 849, as sustaining the position of Appellant. The issue in that case was with reference to a prohibition by the State

of Kentucky against the consolidation of railways, and the point was made against such prohibition, that it was void because of the grant to Congress of the power to regulate commerce among the states, and this court held against such contention. It will be observed that Congress at that time had not acted upon the subject, and, therefore, the case comes within the rules that the State could act upon the subject in the absence of the action by Congress. Also, the question of consolidation is not similar to the question at bar. It should be noted also that Congress has now acted upon the subject of consolidating railroads by the provisions contained in the Transportation Act, and this question is not before the court.

The case of C. M. & S. T. Paul Ry. vs. Minn. C. & C. Assn., 247 U. S. 490, 62 L. Ed. 1229, was one in which the question was presented of whether or not a mile or two of terminal railway owned by a Terminal line was an independent railway, where the facts showed that it had entered into a contract with two other lines of railway, which deprived its Board of Directors of the power of control, and where the manner in which the traffic was handled showed that it became a mere agency or extension of the two other main lines referred to. It was appealed from a decision of the Supreme Court of the State of Minnesota, holding that there had been a consolidation of this Terminal Railway with the other lines. The holding of the Supreme Court was based on findings of the State Commission

and the decision of the state District Court. This court affirmed the holding of the State Supreme Court.

There was no similarity in that case and the case at bar. Here the St. Louis Southwestern Railway Company, a Missouri corporation, had purchased the stock of the Eastern Texas Railroad Company. There is no other proof of consolidation except that thereafter the officers of the two southwestern Companies and the Eastern Texas Railroad Company were very similar, but it was shown that the organization of the Eastern Texas Railroad Company was continued, and that the divisions which it obtained on traffic were fair and reasonable, and all other things showed in connection with its control and operation continued it as an independent railroad under the Constitution and Laws of the State of Texas. This is apparent from the pleadings contained in the transcript. See Defendant's Answer and Supplemental Answer, pages 20 and 33 of report of the Interstate Commerce Commission, pages 53-57 inclusive. We submit, therefore, that the question of the Eastern Texas Railroad being a part of the Cotton Belt system is not involved in the case.

See also Peterson vs. C. R. I. & P., 205 U. S. 36; 51 Fed. 841.

DUE PROCESS OF LAW—FOURTEENTH AMENDMENT.

A carrier cannot be compelled to carry on even a branch of its business at a loss, much less the whole business of the carrier.

The above proposition is quoted from the opinion of this court in the case of Brooks-Scanlon Company vs. Railroad Commission of Louisiana, 251 U. S. 396, 64 L. Ed. 323, which was a case in which the Appellant, Brooks-Scanlon Company, brought suit against the Railroad Commission of Louisiana, seeking to set aside an order of that Commission requiring the plaintiff, either directly or through arrangements made with the Kentwood & Eastern Railway Company to operate its narrow gauge railway between Kentwood and Hackley in Louisiana. Plaintiff claimed it could not operate said road without a loss, and that this would deprive plaintiff of its property without due process of law. Appellee, the Louisiana Commission, denied these allegations and in reconviction prayed for an injunction against the tearing up and abandoning the road and for a mandate upholding the order. In the trial court in Louisiana a preliminary injunction was issued, but was dissolved, and on final hearing a judgment was entered holding the order of the Commission void. There was an appeal to the Supreme Court of Louisiana, where the decision was reversed, and the injunction reinstated as prayed for. Writ of certiorari was issued to this Court to review that judgment, and this Court made the above statement of the law governing the question involved.

The opinion shows that the Louisiana Commission relied upon the contract embraced in the charter granted under the State law. This Court recognized the right of the State to require the exercise of the

charter powers, and said:

"If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss."

Again this Court say:

"Whatever may be the forms required by the local law, it cannot give the court or Commission power to do what the Constitution of the United States forbids, which is what the order and injunction attempt. Pennsylvania R. Co. vs. Public Service Commission, November 10, 1919, 250 U. S. 566, 63 L. Ed. 1142."

The above case is practically on "all fours" with the case at bar, and is supported by the case of C. B. & Q. Ry. vs. Chicago, 166 U. S. pp. 224-6, 41 L. Ed. 979, in which at page 233 this court, speaking through Mr. Justice Harlan, said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State'. This must be so, or as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to

annul or evade it'. *Ex parte Virginia*, 100 U. S. 339, 346, 347 (25, 676, 679); *Neal vs. Delaware*, 103 U. S. 370 (26, 567); *Yick vs. Hopkins*, 118 U. S. 356 (30, 220); *Gibson vs. Mississippi*, 162 U. S. 579 (40, 1078). These principles were enforced in the recent case of *Scott vs. McNeal*, 154 U. S. 34 (38, 896), in which it was held that the prohibitions of the Fourteenth Amendment extended to 'all acts of the State, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the Fourteenth Amendment."

This is followed by reference to a large number of authorities, and one which is specially pertinent is the case of *Scott vs. Toledo*, 36 Fed. 385, 395, 396.

See also *Reagain vs. Farmers' Loan & Trust Co.*, 154 U. S. 302, 38 L. Ed. 1014.

Missouri Pacific Ry. vs. North Dakota, 236 U. S. 585, 59 L. Ed. 735.

EXERCISE OF POWER TO REGULATE BY CONGRESS—MISCELLANEOUS.

When Congress exercised its power to regulate interstate commerce, upon commerce itself or any facility or instrumentality used in commerce or on contracts

controlling the conduct of such commerce, by passing an act on the subject, such Act of Congress is supreme, and all laws of the State must yield thereto.

On the subject of furnishing cars, see C. R. I. P. & P. Ry. Co. vs. H. F. Elevator Co., 226 U. S. 426, 57 L. Ed. 384.

On State penalties for refusal to receive and forward interstate commerce, see Southern Ry. vs. Reid, 222 U. S. 424, 56 L. Ed. 257; Atlantic Coast Line R. Co. vs. Riverside Mill, 219 U. S. 186, 55 L. Ed. 167; St. L. S. W. Ry. Co. vs. Arkansas, 217 U. S. 136, 150, 54 L. Ed. 698, 705.

On regulation of instrumentalities of interstate commerce generally, see Gloucester Ferry Co. vs. Penn., 114 U. S. 196, 29 L. Ed. 158; U. S. vs. C. C. Knight Co., 156 U. S. p. 1, 39 L. Ed. 325.

On the exercise of State police powers, see Railroad Commission cases, 116 U. S. 307, 331, 29 L. Ed. 636, 644; Central R. R. Co. vs. Murphy, 196 U. S. 194, 49 L. Ed. 444.

This rule binds all branches of the State Government. Henderson vs. New York, 92 U. S. 259, 23 L. Ed. 343; Hannibal & St. Jo R. Co. vs. Husen, 95 U. S. 465, 24 L. Ed. 527.

On hours of service, Northern Pacific Ry. Co. vs. Washington, 222 U. S. 370, 56 L. Ed. 237; also Erie R. R. Co. vs. New York, 233 U. S. 671, 58 L. Ed. 1149.

On delegation of the power of Congress to admin-

istrative officers, see Oceanic S. N. Co. vs. Stranahan, 214 U. S. 320, 53 L. Ed. 1013.

On the subject of accounting and bookkeeping, requiring of reports of carriers by water on the Great Lakes, engaged in transporting passengers and property partly by railroad and partly by water, see I. C. C. vs. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729; K. C. S. Ry. Co. vs. United States, 231 U. S. 423, 58 L. Ed. 296.

On rate for long and short hauls, see United States vs. A. T. & S. F. Ry. Co., 224 U. S. 476, 58 L. Ed. 1408.

On delegation of power by Congress to the Interstate Commerce Commission, see K. C. S. Ry. Co. vs. United States, 231 U. S. 423, 58 L. Ed. 296.

ABANDONMENT OF PART OF LINE.

Appellant contends that the Interstate Commerce Commission has no authority under the statute to grant to a railway company a certificate of public convenience and necessity authorizing it to abandon a part of its main line track, in the absence of a showing that the entire system is losing money.

We submit that this not the law. The Brooks-Scanlon case, heretofore cited, is authority for the contrary doctrine. The construction by the Interstate Commerce Commission of the provisions of the Transportation Act in this particular is persuasive. See report of its action in the following applications:

Finance Docket 28, decided November 24, 1920,

granting application of Pere Marquette Railway Company to abandon branch line constructed to develop timber:

Finance Docket 56, decided November 13, 1920, granting application of Atchison, Topeka & Santa Fe Railway to abandon branch line constructed to develop mine.

APPELLANT'S SUIT WAS A COLLATERAL ATTACK
UPON AN ORDER OF THE INTERSTATE
COMMERCE COMMISSION.

The Act of Congress of October 22, 1913, containing provisions from the Urgent Deficiency Appropriations Act, provides that no interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any District Court of the United States, etc., unless the application for the same should be presented to the District Judge and heard and determined by three judges. It is also provided by law that such action should be brought against the United States. The suit of appellant was an independent suit in equity, brought in a State court, and is, therefore, a collateral attack upon the order of the Interstate Commerce Commission made December 2, 1920, granting the Eastern Texas Railway Company authority to abandon its railway.

If said action were permissible in any event, the

bill of complaint of appellant did not show any cause of action or authority to enjoin the action authorized by the Interstate Commerce Commission. See

Seaboard A. L. Ry. vs. Railroad Com. of Ga., 213 Fed. 27;

L. & N. Ry. Co. vs. Railroad Commission, 208 Fed. 35.

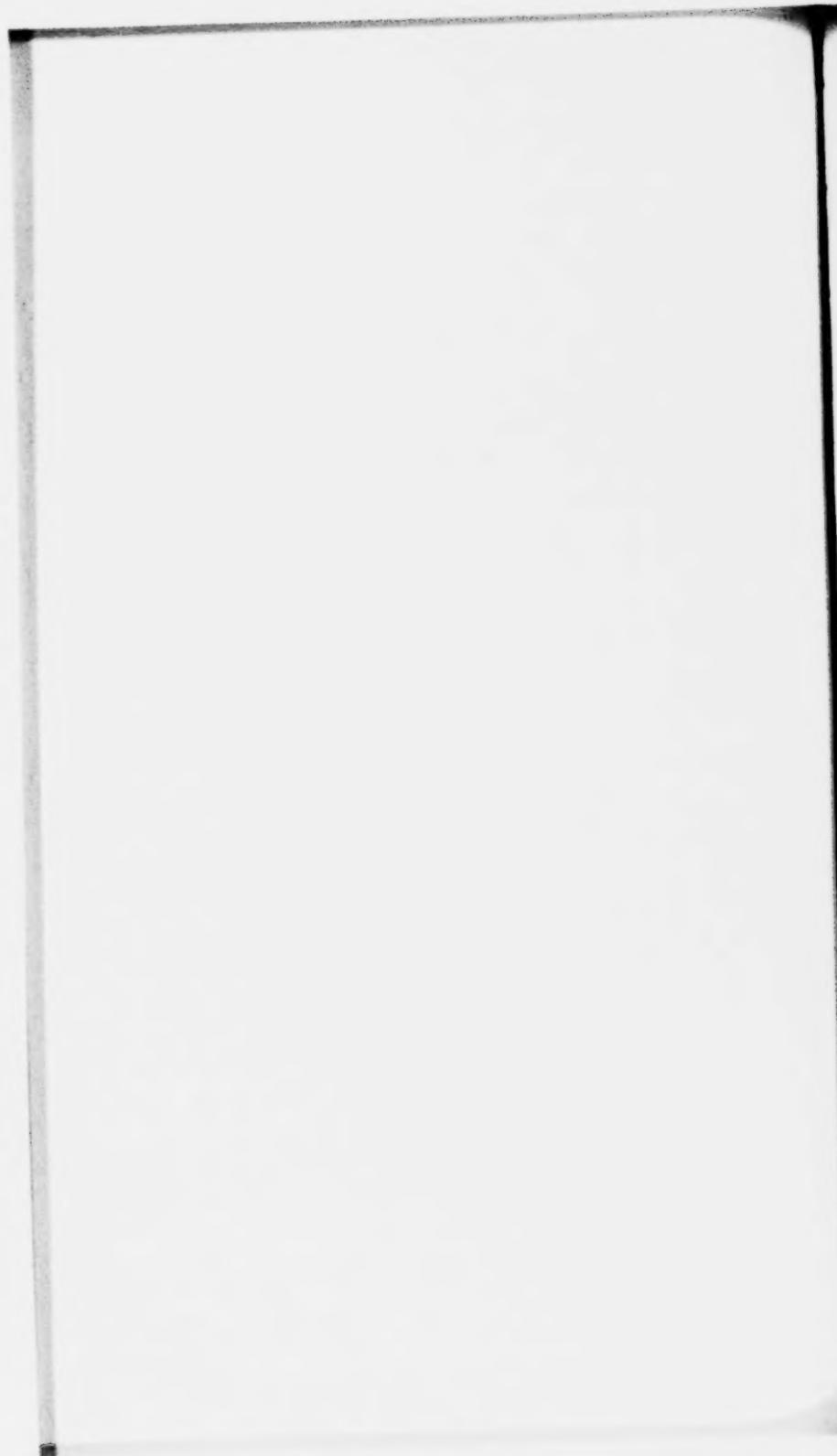
We submit that under the Constitution of the United States, and the laws passed in pursuance thereof, and under the authorities cited, the action of the District Court of the Western District of Texas dissolving the injunction in this cause and entering judgment in favor of appellees should be in all things affirmed.

E. B. PERKINS,

DANIEL UPTHEGROVE,

E. J. MANTOOTH,

Solicitors for Appellees.



IN THE

Office Supreme Court, U. S.

F I L E D

APR 18 1921

JAMES D. MAHER,

CLERK

Supreme Court of the United States

OCTOBER TERM, 1920

No. ~~875~~ 298

THE STATE OF TEXAS

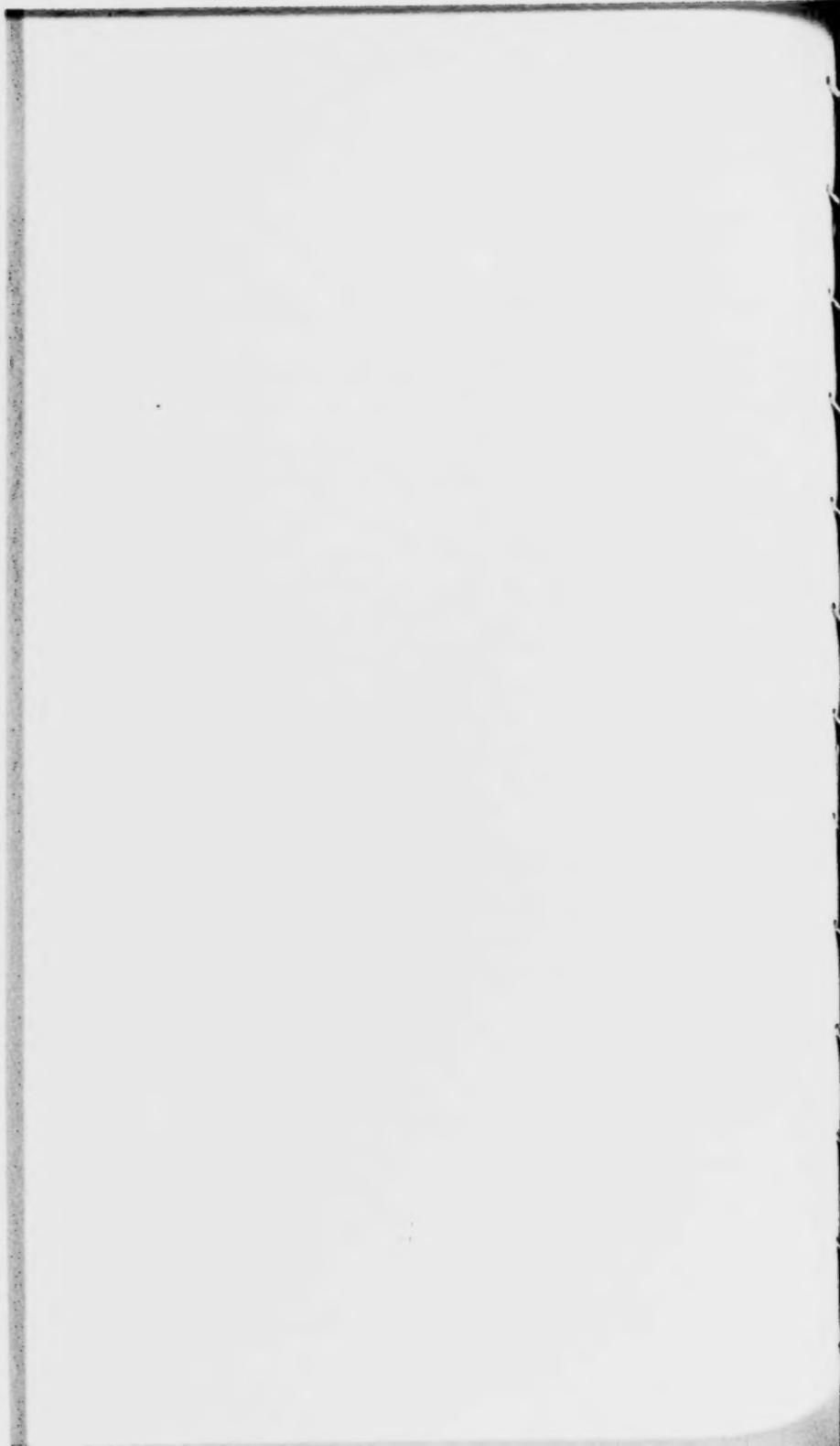
vs.

EASTERN TEXAS RAILROAD COMPANY
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF AND ARGUMENT OF THE APPELLEES
EASTERN TEXAS RAILROAD COMPANY, et al.

DANIEL UPTHEGROVE,
E. B. PERKINS,
Solicitors for Defendants.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1920

No. —.

THE STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF AND ARGUMENT OF THE APPELLEES
EASTERN TEXAS RAILROAD COMPANY, et al.

May it please the Court:

On November 8, 1900, the Eastern Texas Railroad Company, hereinafter for brevity called the Company, was incorporated under the laws of the State of Texas, and was thereafter constructed

from Lufkin, Texas, to Kennard, Texas, a distance of 30.3 miles, to develop certain yellow pine timber lands owned by the Texas and Louisiana Lumber Company in eastern Texas. In 1917 the Lumber Company finished cutting its timber, and the operation of the lumber mill at Ratcliff was stopped and the mill dismantled. It quickly developed that without the output of the mill there would not be sufficient tonnage along the line of the Company to pay operating expenses. Immediately after the Transportation Act of 1920 became effective, the Company made application to the Interstate Commerce Commission to abandon the operation of its line and to take up and dismantle its railroad. On July 9, 1920, the State of Texas, hereinafter called the State, filed suit in the State Court at Austin, Texas, and obtained a temporary injunction against the Company, restraining it from abandoning the operation of its line. This cause was removed by the Company to the United States District Court for the Western District of Texas; and on March 15, 1921, that court, after trial of the case on its merits, rendered a decree in favor of the Railroad Company and dissolved the temporary injunction theretofore granted by the State Court. On the trial of the case the State in its pleadings raised the question and insisted that if the temporary injunction then existing was dissolved and not made permanent, the Railroad Company would take up its tracks and dismantle its property and thereby destroy the subject matter of the suit.

This question was also necessarily involved in the petition for appeal.

Although the District Court had all the parties before it and the entire subject matter under consideration, it declined to restrain the Company from taking up its tracks and dismantling its property during the pendency of this appeal. The State in its application and brief raised the question as to whether or not the charter of the Company granted by the State constitutes a contract, and also whether or not the Company is a part of the St. Louis Southwestern Railway system. These questions, we submit, should only be considered by this court upon the submission of this case on its merits, and the only question now under consideration is whether or not this court should grant an injunction restraining the Company from dismantling its road pending this appeal. We submit that the State's application for an injunction pending this appeal should be dismissed for the following reasons to wit:

I.

BECAUSE THE ORDER OF THE INTERSTATE COMMERCE COMMISSION GRANTING THE COMPANY A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, AUTHORIZING IT TO ABANDON THE OPERATION OF ITS LINE AND TAKE UP AND SALVAGE ITS PROPERTY, IS FINAL AND CONCLUSIVE AND IS NOT SUBJECT TO COLLATERAL ATTACK BY THE STATE IN THIS CAUSE.

The Company contends that the order of the Interstate Commerce Commission under review is not subject to collateral attack by the State in its suit against the Company, and that the only method provided by law to restrain the Company from carrying out the order of the Commission would be to bring a direct proceeding against the United States. Paragraph second of Section 207 of the Judicial Code provides that the Commerce Court shall have exclusive jurisdiction over "cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission." Compiled Statutes of 1918, Section 993, paragraph second.

By the Act of October 22, 1913 (c. 32, 38 Stat., 219) the jurisdiction of the Commerce Court was transferred to the various District Courts.

In the Illinois Passenger Fare case (*Illinois Central Railroad Commission vs. Public Utilities Commission*, 245 U. S., 493), this court held:

"The cross-bills assailed the validity of the Commission's order on various grounds and concluded with a prayer that it be set aside and annulled and that the United States and the Commission be enjoined from enforcing it and the carriers from complying with it. Passing the fact that they were presented as *cross bills*, it is apparent that in subject matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States, Jud. Code, pp. 208, 211; c. 32, 38 Stat., 219-220, and the jurisdictional

provision before mentioned permits them to be brought only in designated districts. Here the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and being suable only by its consent, could not be sued in a district not within the consent given."

* * * * *

"As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the State authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the Court empowered by law to entertain a suit of that nature."

In the case of *United States vs. Louisville and Nashville Railroad Company*, 235 U. S., 314, which involved a controversy as to the legality of a re-shipping privilege, at Nashville, Tenn., by the carriers, this Court laid down the following rule:

"In view of the doctrine announced in *Interstate Com. Com. v. Illinois Cent. R. R.*, 215 U. S., 452; *Interstate Com. Com. v. Delaware, L. & W. R. R. Co.*, 220 U. S., 235; *Interstate Com. Com. v. Louisville and Nashville R. R.*, 227 U. S., 88, it plainly results that the court below, in substituting its

judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn. &c. Ry. Co. v. Interstate Com. Com.*, 181 U. S. 1, 23-29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise, since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."

To the same effect is the holding of this Court in the case of *Texas and Pacific vs. Cisco Cotton Oil Company*, 204 U. S., 426. *Loomis vs. Lehigh Valley R. R.*, 240 U. S., 43.

The contention of the Company therefore briefly

is that the order of the Interstate Commerce Commission is binding and conclusive upon both the State and the Company and cannot be attacked by the State in this suit; but if the State desires to enjoin said order, it should file a suit against the United States and obtain service and proceed as required by law. The order of the Interstate Commerce Commission was entered December 2, 1920, authorizing the Company to abandon its road and the State has therefore had ample time to bring such proceeding to enjoin the same. Having failed to pursue the remedy provided by law to enjoin said order, the Company now insists that the State has no right to enjoin the same or any part thereof.

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE STATE COULD NOT ENJOIN THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IN THIS SUIT AND THEREFORE THE DISTRICT COURT DID NOT ABUSE ITS SOUND DISCRETION IN REFUSING TO GRANT AN INJUNCTION PENDING THE APPEAL OF THIS CASE.

Equity Rule No. 74 provides that when an appeal is taken from a final decree in equity dissolving an injunction, the judge may, in his discretion, make an order sustaining, modifying or restoring the injunction during the pendency of the appeal. The District Court correctly concluded that the

State could not collaterally attack the order of the Interstate Commerce Commission, that it could not therefore enjoin the order in the instant case and correctly held that no injunction should be granted the State pending the appeal.

Our contention is, therefore, that under the facts and the law governing this case, the District Court was without power to continue the injunction in force. Granting, however, for argument sake, that it was within the discretion of the District Court, then we say that such discretion has not been abused. The findings of fact by the Interstate Commerce Commission show that there was a deficiency incurred in the operation of the Company's road in 1918 of \$20,128.46. In 1919 it was \$49,362.64. In January and February, 1920, it was \$10,484.27; that the road had been in operation since 1902, and its Balance Sheet showed a credit balance of \$32,393.68 on May 1, 1920. Company's answer pages 15-16.

The report of the Commission further shows that there are fifty (50) bridges and trestles, with a combined length of 8,862 feet, which range in height from 5 to 25 feet. That six (6) bridges and trestles, with a combined length of 2,280 feet were, at the time the report was made on December 2, 1920, in immediate need of renewal to insure safe operation, and all the others in need of heavy repairs. That the Company estimated that if operation were continued it would be necessary to expend \$146,000 to \$200,000 on its roadbed, bridges and trestles. The record further shows that the

Company offered to take \$50,000 for its entire railroad, and the Commission ordered that the Company offer said line for sale for that amount, which was done but no bids were received. Company's answer pages 16-17. That the operating ratio of the Company was 440 per cent under the rates in effect immediately prior to the increase authorized in "Increased Rates, 1920, 58 I. C. C. 220." Company's answer page 16.

The situation presented, therefore, was this: The Railroad Company had offered all its property for sale at \$50,000 and received no bid. In order to continue operation it was necessary to make an expenditure of from \$146,000 to \$200,000, or three or four times the value of the entire property. During the year 1919, there was a deficit of \$49,362.64, which was an approximate value of all the Company's property. At the time of the Commission's report, the Company's operating ratio was 440 per cent; in other words, for every \$1 earned it was compelled to expend \$4.40. In the fact of such facts the Court correctly concluded that no useful purpose could be served by compelling the Company to let its property lie while the State was prosecuting its appeal. Equity and fairness under the circumstances prompted the Court to permit the Company to proceed with the order of the Commission and save whatever salvage it could for its stockholders out of the rails, ties and other property of the Company.

III.

THE STATE SHOULD NOT BE PERMITTED TO DEPRIVE THE COMPANY OF ITS PROPERTY OR CAUSE IT TO SUFFER LOSS DURING THE PENDENCY OF THE APPEAL WITHOUT FIRST BEING REQUIRED TO GIVE BOND OR OTHER INDEMNITY TO PROTECT SAID COMPANY.

The State in its brief says that it cannot become a principal or surety on any bond, and that in no way would a bond bind it in damages; and that it can not, therefore, offer to make bond to secure appellees against damage by reason of an injunction issued by this Court.

We contend that this admission alone is sufficient to authorize this Court to decline to consider further the State's application. When the State filed this suit it laid aside its sovereignty and has no more rights in this Court than any private litigant. It is governed by the same principles of law and equity and is bound by the same rules of practice and procedure as private litigants. Certainly, no Court of equity would permit one private litigant to restrain another private litigant from enjoying the use of its property pending an appeal, without first requiring bond or other security to protect the party enjoined from all damages sustained pending the appeal. The State has no more rights in this regard than any private litigant. It has no more right to demand that the Company be deprived of the use of its property

by injunction during this appeal than a private litigant would have. As above stated, it has laid aside all of its sovereignty and is no more entitled to deprive this Company of the use of its property by injunction than a private citizen would have under the same circumstances. Furthermore, the State being a sovereign power cannot be sued without its consent. The Company therefore would have no recourse in the Courts to recover the damages sustained by it during the pendency of this appeal, so that the position of the State is that it is demanding of this Court that its adversary be required to sustain whatever loss or damage may occur pending the appeal, without giving bond or other indemnity and without its adversary having the right to have its claim adjudicated by the Courts while the State is taking an appeal to this Court.

It occurs to us that a statement of this position is its own answer.

We therefore submit that the State has shown no grounds authorizing it to have a writ of injunction pending this appeal and that the said application should be dismissed.

Respectfully submitted,

DANIEL UPTHEGROVE,
E. B. PERKINS,
Solicitors for Defendants.

case, could make no point and did make no point of the circumstance that the Federal question was not presented in the bill of complaint. Because of this principle, it must be assumed that this Court, in deciding that motion, proceeded upon the assumption that the alleged Federal question was properly presented to the State Supreme Court.

We respectfully submit, therefore, that this Court should grant our motion to dismiss, or that, if it does not do so, it should grant our motion to affirm the decree of the State Court, upon the ground (see *Worcester case*, 196 U. S. 539, set forth in our principal brief (pp. 7-9) in support of the motion in the Groesbeck case) that the contention that the municipality's contract obligations were impaired is entirely lacking in merit and needs no further argument.

Respectfully submitted,

Elliott G. Stevenson,

William L. Carpenter,

Counsel for Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 563.

THE STATE OF TEXAS AND C. M. CURETON, PERSONALLY
AND AS ATTORNEY GENERAL FOR THE STATE OF
TEXAS, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, CHARLES C. Mc-
CHORD ET AL., CONSTITUTING THE INTERSTATE
COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TEXAS.

FILED OCTOBER 3, 1921.

(28,518)

(28,518)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 563.

THE STATE OF TEXAS AND C. M. CURETON, PERSONALLY
AND AS ATTORNEY GENERAL FOR THE STATE OF
TEXAS, APPELLANTS,

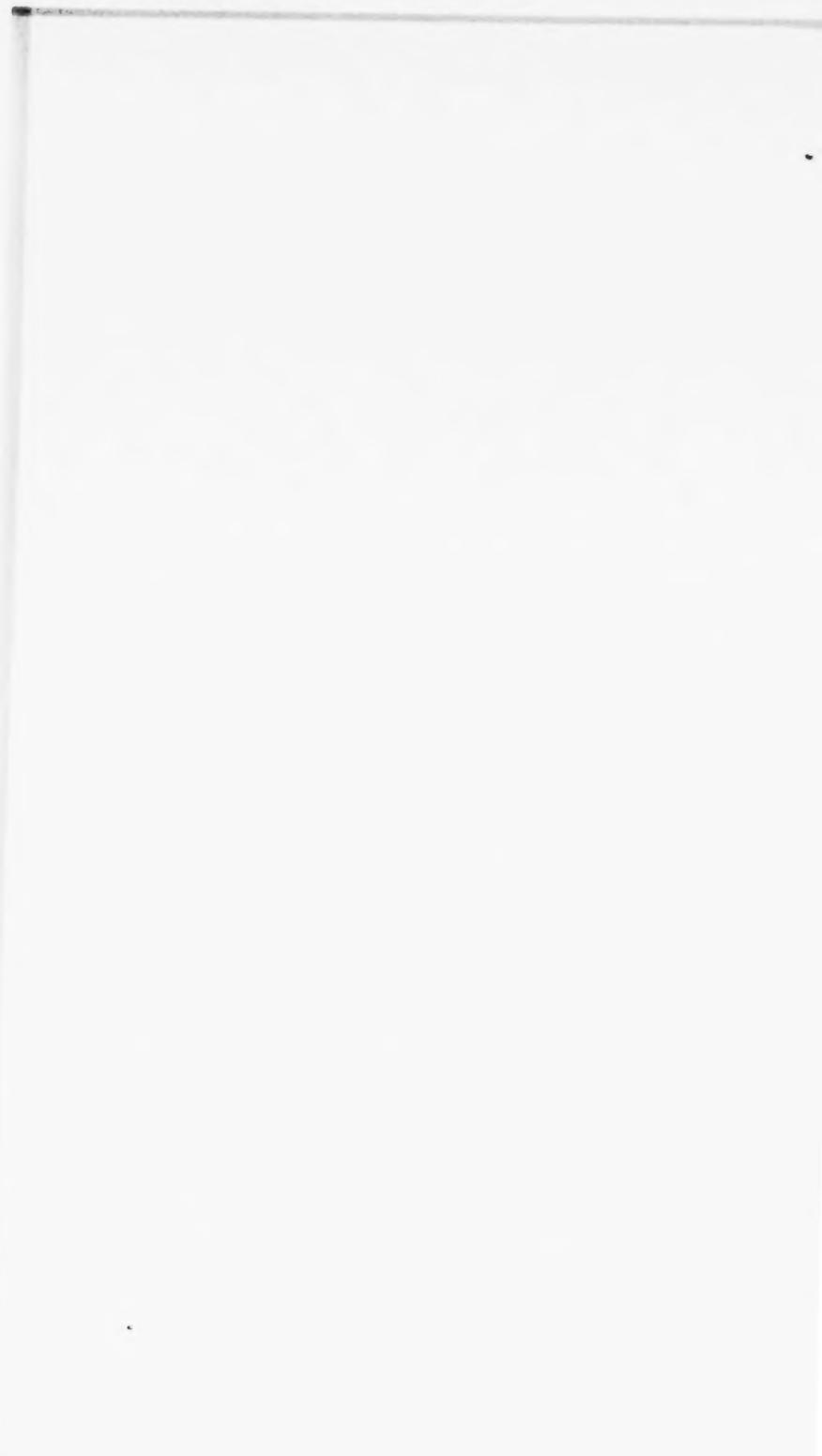
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COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF TEXAS.

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a Supreme Court of the United States, — Term, 192-.

No. —.

STATE OF TEXAS et al., Appellants,

vs.

UNITED STATES et al., Appellees.

— — —, Counsel for Appellants.

— — —, Counsel for Appellees.

Caption.

Be it remembered, that a term of the United States District Court for the Eastern District of Texas, begun on July 12th, A. D. 1921, and continued to and including the 21st day of September, A. D. 1921, the Honorable R. W. Walker, Senior Circuit Judge of the Circuit Court of Appeals of the Fifth Circuit, Honorable DuVal West, United States District Judge for the Western District of Texas, and the Honorable W. L. Estes, United States District Judge for the Eastern District of Texas, presiding; the following proceedings were had and the following cause came on for hearing, to-wit:

Equity. No. 42.

THE STATE OF TEXAS et al.

versus

UNITED STATES et al.

1

(1.)

In the District Court of the United States, Eastern District of Texas.

THE STATE OF TEXAS and C. M. CURETON, Personally and as Attorney General for the State of Texas, Plaintiffs,

v.

THE UNITED STATES and EDGAR E. CLARK, CHARLES C. McCHORD, Balphaser H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Aichison, Joseph B. Eastman, Mark W. Potter, John J. Esch, E. L. Lewis, and J. W. Campbell, Constituting the Interstate Commerce Commission; H. M. Daugherty, Attorney General of the United States; the Eastern Texas Railroad Company, the St. Louis Southwestern Railway Company of Texas, and the St. Louis Southwestern Railway Company, Defendants.

Petition and Bill of Complaint.

To the Honorable Judge of the District Court of the United States for the Eastern District of Texas.

Come the State of Texas, C. M. Cureton, personally and as Attorney General of the State of Texas, and bring this Bill of Complaint against the United States and the Interstate Commerce Commission, H. M. Daugherty, Attorney General of the United States, The Eastern Texas Railroad Company, The St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas, and respectfully allege and show unto this Honorable Court

I.

That the plaintiff, the State of Texas, is one of the sovereign States of the Union, and C. M. Cureton is a citizen of the State of Texas and of the United States and is Attorney General of the State of Texas, duly elected, qualified and acting as such, and has legal capacity to sue herein as will more fully appear with other necessary allegations of jurisdictional facts. The United States is made a party defendant herein by virtue of the authority and requirements of the Act of October 22, 1913, (38 State L. 219) and known as the District Court Act and because the Interstate Commerce Commission, defendant herein, claims to have derived its authority for the unconstitutional and illegal acts committed by said Interstate Commerce Commission, and hereinafter complained of, from said defendant, the United States, and because the unconstitutional statutes hereinafter complained of were enacted pursuant to the authority of said defendant, the United States. The Interstate Commerce Commission, one of the defendants herein, is a regulatory body claiming jurisdiction over common carriers engaged in Interstate Commerce and is constituted and existing under and by virtue of an Act of Congress known as the Interstate Commerce Act and consists of the following persons with their residences according to the information and belief of plaintiffs:

Edgar E. Clark, residing in the State of Iowa; Charles C. McChord, residing in the State of Kentucky; Balphaser H. Meyer, residing in the State of Wisconsin; Henry C. Hall, residing in the State of Colorado; Winthrop M. Daniels, residing in the State of New Jersey; Clyde B. Aichison, residing in the State of Oregon; John J. Esch, residing in the State of Wisconsin; Joseph B. Eastman, residing in the State of Massachusetts; E. I. Lewis, residing in the State of Indiana; Mark W. Potter, residing in the State of New York; J. W. Campbell, residing in the State of Washington.

H. M. Daugherty is Attorney General of the United States and has his domicile at Washington, D. C. The Eastern Texas Railroad Company is a corporation duly incorporated under the laws of the State of Texas, and has its general offices and place of business at

Tyler, Smith County, Texas, within the bounds of the United States District Court for the Eastern District of Texas, and having as its president, J. M. Herbert, who resides in St. Louis, Missouri; and that D. C. Dobbins, who resides at Tyler, Smith County, Texas, is its general superintendent; that said railroad company owns a line of railroad extending from Lufkin in Angelina County, Texas, to Kennard in Houston County, Texas, all of which lies wholly within the bounds of the United States District Court for the Eastern District of Texas, and that said railroad is doing business under the charter granted to it by the State of Texas on the 8th day of November, A. D. 1900, which said charter with all of its terms are herein-after more fully pleaded.

The St. Louis Southwestern Railway Company is a corporation duly incorporated under the laws of the State of Missouri, having its general offices at St. Louis in the State of Missouri and having as its president, J. M. Herbert, who also resides at St. Louis, Missouri; and that the St. Louis Southwestern Railway Company of Texas is a corporation duly incorporated under the laws of the State of Texas with its principal offices at Tyler in Smith County, Texas, within the bounds of the District Court of the United States for the Eastern District of Texas; that its president is J. M. Herbert who resides in St. Louis, Missouri, and that D. C. Dobbins, who resides at Tyler in Smith County, Texas, is its general superintendent.

This suit involves questions arising under the Constitution and laws of the United States and is a case in which a State is a proper party and in which the United States and officers thereof are defendants and the amount involved in the controversy as to each of the parties is in excess of three thousand dollars (\$3,000) exclusive of interest and costs.

This is a suit to suspend and set aside an order of the Interstate Commerce Commission and is brought pursuant to the provisions of the Judicial Code of the United States and of the Act of October 23, 1913, (Chapter 32, 38 Stat. L. 220), wherein the Commerce Court was abolished.

II.

The order which the petitioners seek to have suspended and set aside is an order made by the Interstate Commerce Commission on December 2, 1920, in Cause No. 1 Ab-1, finance docket No. 4, entitled, "In the Matter of the Application of the Eastern Texas Railroad Company for a Certificate of Convenience and Necessity." The copy of said order and the report of said Interstate Commerce Commission, filed in connection therewith, is hereto attached, marked Exhibit "A," and made a part of this petition.

The order herein referred to was made upon the petition of the Eastern Texas Railroad Company in which it was aided and assisted by the St. Louis Southwestern Railway Company of Texas and the St. Louis Southwestern Railway Company, each of which had their

residences at their respective general offices as hereinbefore alleged
and the matters complained of in said petition of said carriers
5 before the Interstate Commerce Commission upon which the
investigation was instituted by said Interstate Commerce Commission
and in which said order in said Cause No. 1 Ab-1 was made,
arose in the Eastern District of Texas.

III.

Plaintiffs allege that the Eastern Texas Railroad Company did, on the 8th day of November, A. D. 1900, file its Articles of Association in the office of the Secretary of State of the State of Texas, and thereby and thereafter became and has continued to be a corporation under the laws of the State of Texas, and that its charter, which is hereto attached, marked Exhibit "B," together with all laws of the State of Texas, became the contract between the said railroads and the State of Texas, whereby, among other things, said railroad company bound and obligated itself to operate its line of railroad for a period of twenty-five years and until it should obtain consent of the State of Texas to abandon the operation of the trains of its line of railroad. That the name of said railroad corporation under said Articles, was and is, "Eastern Texas Railroad Company;" that it was a charter "for the purpose of constructing or maintaining and operating" a railroad from the town of Lufkin in Angelina County, State of Texas, to the City of Crockett in Houston County, Texas; and that in pursuance to said contract and charter the said railroad company did construct and operate trains upon its line of road from Lufkin in Angelina County, Texas, to Kennard in Houston County, Texas, and has continuously operated same in full recognition of its charter contract and of its obligations under the laws of the State of Texas existing at the time of the granting of its charter, and those that have been enacted by the Legislature of the State of Texas subsequent to said time in accordance with the Constitution of
6 the State of Texas.

It was declared that the corporation should begin to exist on the first day of November, 1900, and continue as a corporation for a period of twenty-five years therefrom. The amount of the Eastern Texas Railroad Company's capital stock as stated in its charter was \$150,000.00; the names and places of residence of the several persons forming the corporation were R. H. Keith, Kansas City, Missouri; W. C. Perry, Kansas City, Missouri; John Perry, Kansas City, Missouri; J. C. Sherwood, Kansas City, Missouri; Chas. Campbell, Kansas City, Missouri; D. A. Nunn, Crockett, Texas; D. A. Nunn, Jr., Crockett, Texas; John Morrison, Texarkana, Texas; W. H. Carson, Texarkana, Texas; W. H. Welch, Texarkana, Texas. The names of its first Board of Directors were; W. H. Carson, Texarkana, Texas; W. H. Welch, Texarkana, Texas; D. A. Nunn and D. A. Nunn, Jr., Crockett, Texas; R. H. Keith, Kansas City, Missouri; W. C. Perry, Kansas City, Missouri; J. C. Sherwood, Kansas City, Missouri.

The government of the Eastern Texas Railroad Company in the management of its affairs, was vested by its charter in the Board of Directors, President, Vice-President, Secretary and Treasurer and a superintendent or manager. Its capital stock was divided into 1500 shares of the par value of \$100.00 each.

Afterwards on the 20th day of February, 1901, the Eastern Texas Railroad Company filed an amendment to its charter, naming the counties through which its proposed line should run. Afterwards, on or about the 26th day of August, 1902, said railroad further amended its charter by increasing its capital stock from \$150,000.00 to one million dollars. Thereafter, on or about the 28th day of

November, 1910, it again amended its charter and changed 7 its general offices from the town of Kennard to the City of

Lufkin in Angelina County. Said railroad by its act in becoming a corporation under the Constitution and laws of Texas, and by its several amendments thereof to its charter, became a corporation chartered under the Constitution and laws of Texas, with the rights and privileges granted railroad corporations by the Constitution and laws of the State of Texas, and became charged with all the burdens and liabilities imposed by such Constitution and laws. Its charter and the several amendments thereof, constitute an agreement and contract between said railroad company and the State of Texas for a period of twenty-five years from the 18th day of November, 1900, by reason of which it became and is obligated and bound to operate its trains on said line of railroad until the 8th day of November, 1925.

Said railroad company did operate and maintain its line of railroad as stated under the privileges and franchises received by it in accordance with its charter and the Constitution and laws of the State of Texas; it became obligated and bound to obey all of the constitutional statutes of the State of Texas and all lawful orders of the Railroad Commission of the State of Texas; each and all of the statutes of this State regulating railroads entered into and became a part of its charter contract, and were then and have since remained and are now binding upon said railroad company.

Among other obligations which the Eastern Texas Railroad Company accepted when it became a corporation was that it would not abandon, take up and remove its main line of railway without the consent of the Legislature of the State of Texas, which it has not obtained. It further obligates itself to continue to operate its trains

as provided for by the laws of Texas, and obey the lawful 8 orders of the Railroad Commission of Texas. By virtue of

its said charter contract with the State of Texas, said railroad company obtained the right to be a railroad corporation and common carrier of passengers and freight for hire, with the right to charge fares, freights and tolls for its services; and with the right to be protected in the exercise of these franchises and rights by the Constitution and laws of the State of Texas. Said railroad company, by reason of its charter, obtained the extraordinary right, privilege and franchise of eminent domain which it either did or could have exercised, and which it may yet exercise should it find

it necessary in carrying out its purposes as a chartered railway corporation under the Constitution and laws of this State. Said railroad company after having obtained its charter, proceeded to exercise the rights, privileges and franchises thereby granted to it by the State of Texas, and did construct its railroad, and for a period of approximately twenty years has operated same as a common carrier of freight and passengers for hire, and has collected large sums of money as a common carrier under and by virtue of the franchises, privileges and rights granted it by the Constitution and laws of Texas.

Among other privileges and rights required of said railroad company by virtue of its charter, was that of receiving donations of right-of-way upon which its line of railway should be constructed, and complainants allege that it did receive large and valuable donations of right-of-way from citizens and concerns along its line, to wit: about 50% of the right-of-way in Angelina County, and about 50% of the right-of-way in Trinity and Houston Counties, the same being donated by the citizens of these respective counties.

By virtue of its charter and franchises and privileges incident thereto, the Eastern Texas Railroad Company obtained the privilege of serving a large territory with a large population, and receiving tolls and charges incident to its business from this territory. That there were and are a number of cities, towns and villages of 200 population or more within twenty miles of said line of railroad, among which may be named Apple Springs in Trinity County, Diboll in Angelina County, Alto in Cherokee County, Crockett in Houston County, and Wells in Cherokee County; that the towns on the line are Lufkin in Angelina County, population 5,000; Chaney in Angelina County, population of less than 100; Ratcliff in Houston County, population of 900; Kennard in Houston County, population of 1,200; that said railroad was and is the only railroad at any of the last four named towns except at Lufkin, but at Lufkin there are five other railroads to wit: The St. Louis Southwestern Railway Company of Texas; Angelina and Neches River Railroad; Groveton, Lufkin and Northern Railroad; Texas Southeastern Railroad and Houston East and West Texas Railway.

Complainant alleges that the Eastern Texas Railroad Company enjoyed the right of interchange of traffic with the railroads under a guarantee to it by the Constitution and laws of the State of Texas which became effective upon the filing of its charter and was and is one of the franchise privileges thereunder.

IV.

Complainant alleges that on or about August 28, 1906, the Eastern Texas Railroad Company sold its net current assets amounting to \$24,601.49, and its rolling stock having a book value of \$70,000.00 to the Louisiana and Texas Lumber Company. That on September 1, 1906, the St. Louis Southwestern Railway Company, a Missouri corporation and one of the defendants herein, acquired the entire

capital stock of the Eastern Texas Railroad Company and still owns same except qualifying shares owned by its Board of Directors.

That since its capital stock was so acquired by the said Missouri corporation, the Eastern Texas Railroad Company has ceased to have or exercise any will or purpose of management of its own, but all of its activities as a common carrier have been merged with and become a part of the system of railways in Texas controlled by the St. Louis Southwestern Railway Company, the Missouri corporation, either directly or indirectly through a subsidiary of the last named company, to wit: The St. Louis Southwestern Railway Company of Texas.

J. M. Herbert is president of and a member of the Board of Directors of the three railway companies named as defendants herein; F. W. Green is vice-president and a director of the said named three defendant railway companies; G. K. Warren is secretary of the St. Louis Southwestern Railway Company (of Missouri) and assistant secretary and treasurer of the St. Louis Southwestern Railway Company of Texas and of the Eastern Texas Railway Company; D. C. Dobbins is superintendent of the St. Louis Southwestern Railway Company of Texas and of the Eastern Texas Railroad Company and the Auditing Department of the Eastern Texas Railroad Company is done under arrangement by the Auditing Department of the St. Louis Southwestern Railway Company of Texas.

At the time of the entering of the order by the Interstate Commerce Commission and long prior thereto, the employees operating trains, repairing tracks, as well as bridge gang and all other employees of the Eastern Texas Railroad Company were employed by, paid and discharged by the St. Louis Southwestern Railway Company of Texas, and in the operation of the Eastern Texas Railroad Company, it has for a long period of time been treated in every respect as a part of the line of the St. Louis Southwestern Railway

Company of Texas, under the same management in every respect and as owned by the St. Louis Southwestern Railway Company (of Missouri). The St. Louis Southwestern Railway Company (of Missouri) owns, controls and operates approximately 810.5 miles of railroad in Texas, including the mileage of the Eastern Texas Railroad Company. The St. Louis Southwestern Railway Company (of Missouri) owns, controls and operates approximately 1,753.83 miles of railroad in the United States, including the 810.5 miles of railroad in Texas above referred to. The mileage of the Eastern Texas Railroad Company constitutes only an insignificant portion of the total mileage of the St. Louis Southwestern Railway Company of Texas, and still smaller portion of the total mileage of the St. Louis Southwestern Railway Company (of Missouri), and the revenues or losses derived from the operation of the line designated in the charter of the Eastern Texas Railroad Company constitute only an insignificant portion of the revenue or losses derived from or incurred by the St. Louis Southwestern Railway Company of Texas or the system of railroads known as the St. Louis Southwestern Railway Company (of Missouri).

V.

Complainants further allege that during the period of the existence of the Eastern Texas Railroad Company and down to and including the year 1917, it was able to earn and did earn and receive a substantial corporate income in excess of its expenses, and that had such net corporate income been properly applied or expended, or any substantial amount thereof been properly applied or expended in the upkeep and betterment of its line of road, said line of road would not require the unusual and extraordinary expenditures alleged in its application herein set out and found to be a fact by the
12 Interstate Commerce Commission. On the contrary, complainants allege that since the acquisition of stock of the said railroad company by the St. Louis Southwestern Railway Company and up to about August 4, 1920, there had been expended on additions and betterments of the said line of railroad the approximate sum of only \$3,793.40, and in equipment the approximate sum of \$2,186.76, making the total expenditure for additions, betterments and equipments of approximately \$5,980.16.

VI.

Complainants further allege that if the Eastern Texas Railroad Company or the company or companies operating it have suffered any extraordinary decrease in revenue since 1917, that said decrease was due, as these defendants believe and allege, to its management under Federal control and to conditions brought about by the war, and to the fact that since the close of the war the country has been going through a period of reconstruction. That within a reasonable time and with restoration in normal conditions, its revenues will, with the exercise of proper diligence on the part of the Eastern Texas Railroad Company, again be sufficient to meet all its proper and necessary expenses, and complainants further allege that if said railroad company has been operated at any extraordinary increase of expense, then such increase was due to the war and conditions prevailing during the period of reconstruction, and that with the return of normal conditions its expenses can with the proper management be materially reduced. The mere fact that said railroad company has not for a time, if such be true, been operated at a profit, such fact is not sufficient reason in law, either under the Fourteenth Amendment to the Constitution of the United States or under the Transportation Act of 1920 for permitting the abandonment of said
13 line of railroad and the discontinuance of operation of same contrary to the laws of the State of Texas and to its charter contract.

VII.

In this connection, complainants allege that the Eastern Texas Railroad Company has no bonded indebtedness of any kind or character. That it has ample assets to secure funds to carry forth its

operation as a common carrier until the same can be operated at a profit, if in fact it was not doing so at the time of the order complained of herein; and it is further alleged that by reason of its ownership by the St. Louis Southwestern Railway Company (of Missouri) and its consolidation with the St. Louis Southwestern Railway Company of Texas, the Eastern Texas Railroad Company and its management being identical with the roads above named, can obtain sufficient funds to carry it over the present crisis in its financial affairs, if any such crisis exists, which is not admitted.

VIII.

Complainants allege, however, that notwithstanding the fact that the stock of the Eastern Texas Railroad Company has become the property of the St. Louis Southwestern Railway Company (of Missouri) and notwithstanding the fact that it has become consolidated with the St. Louis Southwestern Railway Company of Texas, and has become a part of the system of railroads owned and controlled by the St. Louis Southwestern Railway Company (of Missouri) still all the charter obligations and all the statutory obligations resting upon the Texas corporation in the first instance are lasting and binding obligations on it and as to its operation upon the lines with which it has been consolidated.

14

IX.

Complainants allege that prior to the 29th day of December, 1845, all the territory comprising the State of Texas existed as an independent nation of the world known as the Republic of Texas. That as such it had all power over its internal and domestic affairs as well as its foreign affairs, with the right to pass and enforce any and all laws which an independent nation could enact and enforce for the welfare of its people. That it had a constitution and code of laws, with a republican form of government, similar to the constitution and laws of the United States. That on said date it was admitted into the Union as one of the States of the United States and ceased to exist as an independent nation of the world, but became one and has since continuously been a State of the United States. That it was admitted into the Union on equality with all other States of the Union in all respects whatsoever except that it retained the ownership of and ever thereafter continued to own all public lands within its borders. That upon admission to the Union it obtained the same rights and powers of government, legislative, executive, and judicial, over its internal affairs as was retained by and reserved to the several States of the Union.

X.

Complainants are advised, and therefore aver that the Constitution of the United States does not delegate to the National Government any power of police, nor power of legislation with respect to the internal affairs and intrastate commerce of the State of Texas, nor

are said powers prohibited by the Constitution to the State of Texas, but are specially reserved to said State, or to the people, according to the determination of the people of said State.

Complainants are advised, and therefore aver, that in addition to the rights, powers and authority specially or by necessary implication reserved to or retained by the States, or the people, and not granted to the United States by the Constitution and various amendments thereto, there was reserved to the States respectively, or to the people, "all powers not granted to the United States by the Constitution nor prohibited to it by the States." That among these powers were the right to regulate intrastate commerce, and all rates, fares, wages, charges, and contracts relative thereto entered into or made effective within any State; the right to regulate private corporations, and combinations and monopolies in restraint of trade and commerce in intrastate commerce; and various powers, rights and privileges of the States and of the people not necessary to be *enumerated* at this time. That all of these powers thus reserved to the several States were and are denied to the United States by the Constitution.

XI.

That acting within and under the Constitution of the United States, the State of Texas, from the time of its admission into the Union down to the present time, has by its several Constitutions and various statutes exercised the powers thus reserved to it, or left to the people the right to exercise the powers thus reserved to them. That its present Constitution was adopted by the people and became effective in 1876, and, with certain amendments thereafter made, became, was and is the fundamental law of the State, all provisions of which are valid under the Constitution of the United States. That under its said Constitution, Texas has from time to time enacted statutes for carrying into effect the provisions thereof and protecting the rights and liberties therein granted to or retained by the people, all of which are valid under the Constitution of the United States.

That among the constitutional provisions referred to are those relating to equal rights, due process, special privileges and franchises, perpetuities and monopolies, private corporations, common carriers and railways.

Section 3, Article 1 of the Constitution of Texas declares that all men have equal rights and that no man or set of men is entitled to exclusive, separate public emoluments or privileges.

Section 17 of Article 1 provides that no irrevocable or uncontrollable guarantee of privileges shall be made, but all privileges and franchises granted by the Legislature or granted under its authority shall be subject to the control thereof.

Section 19 of Article 1 declares that no citizen shall be deprived of life, liberty, property, privileges or immunities except by due course of the law of the land.

Section 22 of Article 4 makes it the duty of the Attorney General of the State to especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take

such actions in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freights or wharfage not authorized by law, and upon sufficient cause to seek a judicial forfeiture of such charter unless otherwise especially directed by law.

Article 10 of the Constitution of Texas, relates exclusively to railroad corporations. Section 1 of this article declares that any railroad corporation organized under the law for the purpose, shall have the right to construct and operate a railroad between any points in the State and to connect at the State line with railroads of other

States. It provides that every railroad shall have the right to

17 intersect, connect with or cross any other railroad, and that they shall receive and transport each other's passengers, tonnage and cars loaded or empty, without delay or discrimination and under such regulation as shall be prescribed by law.

Section 2 of this Article states that railroads theretofore constructed and which might thereafter be constructed in this State are declared to be public highways and railroad companies common carriers. It makes it the duty of the Legislature to pass laws to regulate freight and passenger tariffs; to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by adequate penalties. It further provides that in the further accomplishment of these objects and purposes, the Legislature may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable.

Section 3 of this Article requires every railroad corporation doing business in the State under the laws or authority thereof, to have and maintain a public office or place within the State for the transaction of its business, where transfers of stock shall be made and where shall be kept for inspection by the stockholders of such corporation, books, in which shall be recorded the amount of capital stock prescribed, the names of the owners of the stock, and the amounts owned by them respectively, the amount of stock paid, and by whom, the transfer of such stock, and the date of the transfer, the amount of its assets and liabilities, and the names and places of residence of its officers. This Section provides for an annual

18 meeting within the State of the directors of every railroad company, and makes it the duty of certain officers of the corporation to make reports to certain State officers, the reports to include such matters relating to the railroads as may be prescribed by law. It is made the duty of the Legislature to pass laws enforcing the provisions of this Section by suitable penalties.

Section 4 of this Article fixes the status of movable property of railroad companies, as personal property makes it liable to execution, etc.

Section 5 of this Article declares that no railroad corporation or the lessees, purchasers, managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation, with, or lease or purchase the works or franchises of, or in any way control any railroad corporation owning or having under its con-

troil a parallel or competing line. It prohibits any officer of any such railroad corporation from acting as an officer of any other railroad corporation owning or having control of a parallel or competing line.

Section 8 declares that no railroad corporation in existence at the time of the adoption of this constitution shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this constitution applicable to railroads.

Section 9 requires that railroads passing within a distance of three miles of any county seat shall pass through the same and to establish and maintain a depot therein, etc.

Article 12 of the Constitution of Texas relates to private corporations. Section 1 prohibits the creation of private corporations except by general law. Section 2 provides that general laws shall be enacted providing for the creation of private corporations, which shall provide fully for the adequate protection of the public and of the individual stockholders. Section 3 provides the right to authorize and regulate freights, tolls, wharfage or fares levied and collected or proposed to be collected or proposed to be levied and collected by individuals, companies or corporations for the use of highways, landings, wharves, bridges and ferries devoted to public use, has never been and shall never be relinquished or abandoned by the State, but shall always be under legislative control and dependent upon legislative authority.

Section 4 makes it the duty of the Legislature to provide a mode of procedure by the Attorney General and District or County Attorneys in the name and behalf of the State to prevent and punish the demanding and receiving or collection of any and all charges as freight, wharfage, fares, or tolls for the use of property devoted to the public, unless the same shall have been especially authorized by law.

Section 5 provides that all laws granting the right to demand and collect freights, fares, tolls or wharfage shall at all times be subject to amendment, modification or repeal by the Legislature.

Section 6 provides that no corporation shall issue stock or bonds except for money paid, labor done or property actually received and declares that all fictitious increase of stock or indebtedness shall be void.

Section 25 of Article 16, provides that all drawbacks and rebate-
ment of freight, transportation, carriage, wharfage, storage, com-
pressing, baling, repairing, or for any other kind of labor or service
of, or to any cotton, grain or other produce or articles of commerce
in this State, paid or allowed or contracted for to any com-
20 mon carrier, shipper, etc., not the true and absolute owner
thereof, are forever prohibited and it shall be the duty of
the Legislature to pass effective laws, punishing all persons in this
State who pay, receive or contract for or respecting the same.

Section 48 of Article 16 preserved all laws in effect in the State of Texas when the Constitution of 1876 was adopted and which were not repugnant to the Constitution or that of the United States.

until such laws shall expire by their own limitation or be amended or repealed by the Legislature.

That under its Constitution, and particularly under the foregoing sections thereof, the State of Texas has enacted a full and complete code of laws relating to railroads and common carriers, corporations, trusts and monopolies.

XII.

Title 115 of the Revised Civil Statutes of Texas (1911) with amendments thereto relates to the subject of railroads. Chapter one of this title relates to the incorporation of railroad companies. It contains no limitations as to the time, place, necessity for, or circumstances under which a railroad may be constructed. Any ten or more persons who are subscribers to the stock may form such a corporation by complying with the terms of this Chapter. (R. S. Art. 6405.)

No corporation, except one chartered under the laws of Texas is permitted to construct, build, operate, acquire, own or maintain any railway within the State. (R. S. Art. 6406.)

This Chapter prescribes the method of incorporation, states when the existence of such a corporation begins, and limits the period of its existence to fifty years. Provision is made, however, for the renewal of corporations whose charters have expired. (R. S. Arts. 6407 to 6416.)

Chapter 2 of this Title authorizes amendments to railway corporation charters, and prescribes the manner thereof. (R. S. Arts. 6417 to 6422.)

Chapters four, five, six and seven of this Title relate to the government of railway corporations by the stockholders, directors and officers.

Each director is required to be a stockholder, and a majority must be residents of the State of Texas. (R. S. Arts. 6439.)

The corporate powers of the corporation are vested in the directors. (R. S. Art. 6445.)

The various duties of the directors, and the rights and privileges of stockholders are defined. (R. S. Arts. 6438 to 6480.)

The funds of the corporation can only be used for its corporate purposes. (R. S. 6457.)

Fully paid stock is non-assessable. (R. S. Art. 6458.)

Authority is conferred upon stockholders to fix the amount of loans which railway corporations may negotiate, fix the rate of interest, and provide the security therefor. (R. S. Art. 6468.)

Railroad stock in bonds can not issue except for money, labor or property actually received, and applied to corporate purposes. Shares of stock can not issue except at par value. (R. S. Art. 6469.)

Fictitious dividends, and other fictitious increase of capital stock or indebtedness is prohibited under penalty. (R. S. Arts. 6470, 6471.)

Chapter eight relates to the right of way of railway corporations, the right thereto, the amount thereof, methods of acquirement, including the right of eminent domain, and generally all regulations relative to the subject. (R. S. Arts. 6481 to 6534.)

22 Railroad corporations, in accordance with the Constitutional provision, are authorized to construct and operate their lines between points within the State, and to connect at the State line with railroads of other states. (R. S. Art. 6481.)

Railroads are granted the right of way over all public lands, together with the right to use any material found upon such land necessary to the construction and operation of their road. (R. S. Art. 6482.)

The beds of all streams in Texas exceeding thirty feet in length are the property of the State and were from the beginning reserved from survey. (Acts of Congress of the Republic of Texas, December 14, 1837; R. S. of Texas, 1879, Art. 3911; R. S. 1895, Art. 4147, and R. S. 1911, Art. 5338.) However, railroad corporations are given the right to construct their lines across, along or upon any stream, water course, highway, or canal of the State. (R. S. Art. 6485.)

Railway corporations are authorized to intersect, join and unite their lines with any other railway line. (R. S. Art. 6499.)

In the acquirement of necessary lands and material for its use, railway corporations, if an agreement therefor can not be made with the owner, are given full and complete power of eminent domain. (R. S. Arts. 6502 to 6534.)

Chapter three of this Title relates to the public officers and books of railroad corporations. The general offices of such companies are required to be kept in the State. (R. S. Arts. 6423.)

The statute names or defines their officers who shall maintain their offices at the place designated for the general office of the company. (R. S. Art. 6424.) It provides what books must be kept open for the inspection of stockholders, any officer or agent of the

State charged with the duty of inspecting them, and for 23 examination by the Legislature. (R. S. Arts. 6429, 6431 and 6432.) Suits are authorized and penalties provided to secure compliance with these articles of the statute. (Arts. 6433, 6434.)

Railway corporations are prohibited from changing the location of their general offices, machine shops or round houses, except with the consent of the Railroad Commission of Texas. (Art. 6435.)

Chapter nine defines various rights and duties of railway corporations. It grants to them the right to have a seal, the power of succession, and the right to sue and be sued, plead and be impleaded. (R. S. Arts. 6535, 6536.)

They are given the power to purchase real and other property, or receive grants of the same, and to convey such property. (R. S. Arts. 6537, 6438.)

They are given the right to erect buildings, stations, fixtures and machinery, to receive and convey persons and property by force of steam or other mechanical power, and in substance to do anything

appropriate or necessary to carry out their corporate purpose. (R. S. Arts. 6541, 6542, 6543.)

They are authorized to borrow money, execute mortgages, and issue and dispose of bonds, subject to the provisions of the statutes. (R. S. Arts. 6544 to 6547.)

In certain instances railroad corporations may abandon, change or re-locate any portions of its line or road, and in the exercise of such authority is granted the power of eminent domain, if necessary. (Arts. Texas Legislature 4th Called Session, Chap. 27, Vernon's Complete Texas Statutes, Arts. 6548a to 6548e inclusive.) Chapter ten prescribes the duties and liabilities of Railroad Corporations. Part of these requirements are that trains shall be run for transportation of passengers and freight; that railway corporations shall receive, transport and deliver passengers and freight upon the

payment of the legal fares, rates or charges. Such corporations are prohibited under penalty from refusing to do so,

or from abandoning the operation of their trains, or from abandoning their roads or any part thereof, or failing to resume the operation of their lines when ordered to operate them by the State Railroad Commission. (R. S. Art. 6552.)

This article, however, does not apply to roads to which the right of eminent domain is not granted by the laws of the State. (R. S. Art. 6552a, Vernon's Complete Texas Statutes.)

This chapter contains various regulatory provisions regulating the operation of railways, many of which it does not appear necessary to specifically mention, though they are a portion of the Code of laws of Texas governing railway corporations.

Railroad corporations are required to receive freight and passengers from connecting lines upon terms defined by the statute. (R. S. Arts. 6608, to 6617.)

XIV.

Chapter Eleven relates to the collection of debts from railroad corporations, to wages of employees, and prohibits the abandonment of the main track of any railroad when once constructed and operated.

Persons in the employ of railroad companies are entitled to thirty days' notice before a reduction in wages may take effect. The Statute provides that the property and franchises of a railroad corporation may be sold for its debts, but certain liabilities are required to be assumed by its purchasers or successors. (R. S. Arts. 6619 to 6625.)

Chapter twelve relates to the forfeiture of the charters of railway companies which do not comply therewith by constructing their lines, together with various relief measures exacted, from time to time, with respect thereto. (Vernon's Complete Texas Statutes, Arts. 6635 to 6636.)

Chapter thirteen defines the authority and duties of Railway ticket agents. (R. S. Arts. 6637 to 6639.)

Chapter fourteen fixes the liability of railroad companies for injuries to their employees. (R. S. Arts. 6640 to 6652.)

XIV.

Chapters fifteen and sixteen are the Railroad Commission Act of the State of Texas. It creates a railroad commission, defines its membership, and the various powers and duties of the Commission. In effect the Commission is authorized to adopt all necessary rates, charges and regulations to govern and regulate freight and passenger tariffs, correct abuses, and prevent unjust discrimination, and to enforce the penalties prescribed by the chapter. The manner and method by which the Commission is to exercise the power conferred upon it is fully set forth in the statute. The power conferred upon the State Commission is in many respects similar to that conferred upon the Interstate Commerce Commission, and generally upon State railway and public utility Commissions throughout the United States, and we deem it unnecessary to plead it in detail. Among other subjects placed under the jurisdiction of the Commission is the issuance of stocks and bonds by railroad corporations. The jurisdiction of the Commission over this subject is complete. The statute, which was enacted in 1893, declares that the power and authority of issuing or executing bonds, or other evidences of debt, and all kinds of stock and shares thereof, and the execution of all liens, and mortgages by railroad corporations in the State are special privileges and franchises, the right of supervision, regulation, restriction, and control of which has always been, is now, and shall continue to be vested in the State government, to be exercised according to the provisions of this and other laws. (R. S. Art. 6717.)

26. Bonds can not be issued in excess of the reasonable value of the property, except in certain emergencies. (R. S. Art. 6718.) The method and manner of issuing stock and bonds is fully set forth in the statutes, and we refer the court thereto for the details thereof.

In addition to the foregoing, Title 20, Articles 707 to 732, inclusive, of the Revised Civil Statutes of this State, defines the duties and liabilities of common carriers. Title 18, Chapters 14 to 21, of the Revised Penal Code of this State creates and defines offences relating to railways, their management, and operation and prescribes punishment therefor.

The State has, also, a complete code of general corporation laws, many provisions of which apply to railways, union depot, and telegraph corporations.

In addition to various penalties and remedies set forth in the statutes relating to railways, the general laws of the State providing for suits by information in the nature of a quo warranto.

XV.

Complainants aver the State of Texas is within all the protective clauses of the Constitution of the United States, and has reserved to it all legislative, executive and judicial powers which were respec-

tively reserved to the State at the time of the formation of the government of the United States and the adoption of its Constitution.

That among other rights so reserved to the several States of the Union and to the State of Texas, was that permitting them to create and control private corporations and particularly private corporations engaged in the business of common carriers, the property of which lies wholly within the State. That the government of 27 the United States and the Congress, which is its agency for legislative matters, and the Interstate Commerce Commission, a legislative and administrative agency created by the Congress of the United States, have no judicial authority authorizing them to determine any justiciable question where the rights of the State are involved; that justiciable controversies between the State of Texas and a sovereign state or the United States can only be determined under the Constitution of the United States, particularly under Article 3, Section 2, and the Eleventh Amendment to the Constitution of the United States, in the Supreme Court of the United States; and cannot be determined before any other court nor before any legislative body or before Congress, nor before any legislative or administrative board or commission, nor before the Interstate Commerce Commission of the United States; that no citizen of the State of Texas, no citizen of any other State, and no corporation of any kind or character can bring an action against the State of Texas, or against those lawfully acting for it as public officers, in any court, nor before the Interstate Commerce Commission of the United States, without the consent of the State of Texas; and that such consent has not been granted by the State of Texas.

XVI.

Notwithstanding the aforesaid constitutional provisions, the Interstate Commerce Commission Act, as amended by Section 402 of the Transportation Act of 1920, was passed in violation thereof and particularly are subdivisions 18, 19, 20, 21 and 22 of said Section 402 being the sections by authority of which the Interstate Commerce Commission acted in granting the order complained of herein, in violation of the Constitution of the United States and particularly of the provisions herein above set out.

28 These subdivisions of this Section prohibit any carrier from making an extension of its line of railroad, from constructing a new line of railroads, or acquiring or operating any line of railroad or extension thereof, or engaging in transportation over or by means of any additional or extended line of railroad, until the carrier shall have first obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require the construction or operation of such additional or extended line of railroad; carriers by railroad are likewise prohibited from abandoning all or any portion of a line of railroad or the operation thereof until there shall first have been obtained from the Commission a certificate that the present or future

public convenience and necessity permit of such abandonment. The application for and issuance of such certificates are to be under such rules and regulations as to hearings and other matters as the Commission may prescribe. Upon receipt of an application for such certificate, the Commission is required to give notices thereof, and file a copy with the Governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated on all or any portion of a line of railroad, or the operation thereof which is proposed shall be abandoned.

The right of being heard is given by the Act in the same manner that hearings are provided for upon complaints or the issuance of securities. The Commission is given power to issue such certificates as are prayed for, or to refuse, or to issue for a portion of a line of railroads or extension thereof, etc. The Act declares, "from and after issuance of such certificate, and not before, the carrier by railroad, may, without securing approval other than such certificate, comply with the terms and conditions contained or attached to the issuance of such certificate and proceed with the construction, 29 operation or abandonment covered thereby."

XVII.

As heretofore shown, the State has a complete system of laws for chartering, regulating, and controlling railroad corporations.

These laws prohibit such corporations from abandoning the operation of their trains, and from taking up and removing their main tracks when once constructed and operated; except, as under actual practice, the Legislature grants consent, or except under conditions named in the statutes, the Railroad Commission of Texas consents thereto.

That the substance and effect of these paragraphs of the Transportation Act are to authorize a carrier to bring an action before the Interstate Commerce Commission against the State and all other interested parties, for the purpose of obtaining a decree authorizing the complaining carrier to abandon all or any portion of its line of railroad, or the operation thereof; that said Act in effect provides for the service of a subpoena or notice on the public and on the State involved by delivery of a copy thereof to the Governor of the State with the right of such state to be heard; that said Act purports to give the Interstate Commerce Commission the right to hear such application and the pleadings and evidence of the parties, including that of the State, and to issue a decree granting to the complaining carrier the right to abandon all or any portion of its lines of railroad or the operation thereof. That said Act purports to confer authority upon the Interstate Commerce Commission to grant such certificate of abandonment and the Railroad Company to carry into effect the terms of the same without securing the approval of the state or any of its agencies or authorities. That the legal effect of said statute is to authorize the Interstate Commerce Commission to adjudicate:

30 (a) That such complaining railroad has complied completely as to time and effect with its charter contract with the State which chartered same;

(b) Or that the State has violated the terms of its charter contract in such manner and form and under such circumstances as would authorize the carrier to no longer abide by and within the same;

(c) Or that the financial condition of the road is such and all the facts and circumstances which surround it are such, that it is not able longer to comply and ought not in law be required to comply with its charter contract with the State and the laws and regulations governing its operation;

(d) Or that to further comply with its charter contract with the State and abide by the laws made for its regulation, would be to take the property of such carrier without due process of law;

(e) Or that for the carrier to longer comply with such charter contract and the laws governing its existence and operation would be confiscatory and unreasonable;

(f) Or that for the carrier to longer abide by its charter contract and the laws of the State governing its existence constitutes a burden on interstate commerce;

(g) Or that other facts exist which authorize the corporation to abandon and take up its line of railroad or to abandon the operation of the same.

That each and all of the issues hereinabove suggested and which may be determined by the Interstate Commerce Commission and all such issues which it is contemplated may be determined by the Interstate Commerce Commission, whether here enumerated or not, are each and all justiciable issues between, the State of Texas and the complaining carrier, or present questions for determination by the legislative department of the State.

Upon advice complainant alleges, that, notwithstanding these averments, the Transportation Act of 1920, in the sections heretofore referred to, pretends to confer authority upon the railway corporations of Texas to cease the operation of their lines, and to take up and remove their main line tracks without the consent of the Legislature of the State of Texas or the Railroad Commission of the State of Texas, and in violation of the Constitution and laws of Texas; that said sections of the Transportation Act, therefore, as to railroad corporations created by the State of Texas, are unconstitutional and void because they are violative of the Constitution of the United States, and particularly of the following provisions, to-wit:

- (a) They violate the Tenth Amendment to the Constitution reserving to the states and the people all power not granted to the United States nor prohibited to the states;
- (b) They violate subdivision 3, Section 8, Article 1, of the Constitution limiting the authority of Congress to the regulation of interstate and foreign commerce;
- (c) They violate the Eleventh Amendment to the Constitution prohibiting suits against the state;
- (d) Said sections violate sections 1 and 2 of Article 3, of the Constitution conferring exclusive jurisdiction over justiciable controversies upon the supreme court and inferior courts of the United States;
- (e) That said sections violate the Fifth Amendment to the Constitution which prohibits the taking of property without due process of law.

That said sections of the Transportation Act, 1920, in so far as the same provides that railroads cannot be constructed nor extensions made of existing roads without the consent of the Interstate Commerce Commission as provided for in said sections, is likewise unconstitutional and void because violative of each and all of the foregoing provisions of the Constitution of the United States; and 32 particularly for the reason that such power and authority is not conferred upon the Congress, nor upon the Interstate Commerce Commission, by subdivision 3, Section 8, Article 1, of the Constitution of the United States, giving Congress the power to regulate interstate commerce; and particularly for the reason that the Tenth Amendment to the Constitution of the United States reserves to the people the power and authority to engage in lawful occupations, and of the Fifth Amendment to the Constitution, which prescribes that one may not be deprived of liberty or property without due process and particularly for the reason that the Constitution of the United States reserves to the several States and to the State of Texas, the right to create and control private corporations and particularly private corporations engaged in the business of common carriers, the property of which lies wholly within the State creating same.

XIX.

Complainants aver that the right exercised by the Interstate Commerce Commission in granting the Certificate of Public Convenience and Necessity herein complained of, claimed by them under Subdivisions 19 to 22 of Section 402, are in violation of the Constitution of the United States and of the various sections thereof as herein set out, and they are contrary to and usurp the powers reserved to the State of Texas, and effectively destroy the contract between the Eastern Texas Railroad Company, and the obligations which the other railroad companies named defendants herein assume between

said railroad company and the State of Texas as specified in its charter and as fully set out in the Constitution and Laws of the State of Texas as herein alleged, and in this connection complainants aver that the exercise of such power of the Interstate Commerce Commission destroys all of the rights of the State of Texas to control the corporation created by it, and destroys all of the laws of the State of Texas regulating common carriers, those pleaded and mentioned herein, as well as all other laws in any way affecting and regulating railroads within the State of Texas, whether properly passed under the police powers of the State or not.

XX.

Complainants further aver that the Eastern Texas Railroad Company obtained its charter, its right to be a corporation, and all the franchises, rights, profits and emoluments incident thereto from the State of Texas upon condition that it should accept as the law governing it, the Constitution of the State of Texas, and it agreed to abide by same. Among the obligations assumed by the Eastern Texas Railroad was that it would not take up and remove the main line track without the consent of the Legislature of the State of Texas and the lawful orders of the Railroad Commission of Texas made for such purpose.

Notwithstanding all of the aforesaid, complainants aver that on or about the third day of June, 1920, the Eastern Texas Railroad Company, acting by and through the officers, directors and attorneys of the St. Louis, Southwestern Railway Company and the St. Louis, Southwestern Railway Company of Texas, who, in fact, own and control the Eastern Texas Railroad Company, as herein above alleged, brought an action by filing an application or petition with the Interstate Commerce Commission against the State of Texas and against the public in the manner and form contemplated by the aforesaid unconstitutional Act of Congress for the purpose of having annulled by the Interstate Commerce Commission its charter contract and all its obligations to the State of Texas, and that the public, so far as continuing its line of railway and the operation of trains thereon was concerned, and for the purpose of securing the right to abandon its entire line of railway, to dismantle same and cease operation of its trains; that there was then published a notice of said application in the name of the Eastern Texas Railroad Company as is required by the unconstitutional Act, and the State of Texas was summoned and cited in effect as in suit at law or equity to appear before the Interstate Commerce Commission as a court and citation or subpoena were delivered to the Governor of Texas, such pretended citation or subpoena being issued under the authority of the Interstate Commerce Commission.

That the said Interstate Commerce Commission, assuming that said unconstitutional Act of Congress was law, proceeded to have testimony taken and a hearing of the subject matter of said complaint; that neither the State of Texas nor its officers and agents ap-

peared at the taking of such testimony or at such hearing, or took any part in such unconstitutional and unlawful proceeding. That notwithstanding these facts and notwithstanding the unconstitutional and void character of this pretended law, and notwithstanding that the State of Texas is protected by the Eleventh Amendment to the Constitution and by the Fourteenth Amendment to the Constitution which protects the contract alleged of the State of Texas with the Eastern Texas Railroad Company, still, nevertheless the Interstate Commerce Commission, did, on the Second day of December, A. D. 1920, enter a judgment and decree which it denominates "Certificate of Public Convenience and Necessity" in favor of said Railroad Company and those acting with it named as defendants herein in which decree the said Interstate Commerce Commission found, in legal effect, that the State of Texas had been duly cited or subpoenaed, and upon this subject the Commission, in its Certificate, recited:

"Upon receipt of such application, the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas."

That said Commission found and concluded in law, upon its own adjudication, that it had given due notice to all parties interested; and it had given a hearing upon application of plaintiff at which all parties in interest were given an opportunity to appear and be heard in the premises.

Complainants aver that in said Certificate or decree referred to, the said Interstate Commerce Commission finds, adjudges and decrees that the present Public Convenience and Necessity permits of the abandonment of all lines of the Eastern Texas Railroad Company, and it declares in said decree that:

"It is therefore ordered that the Eastern Texas Railroad Company be, and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all the property of said Company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated."

A copy of said order in full is attached hereto as Exhibit "A," and is here referred to.

XXI.

Complainants allege that the Certificate of Public Convenience and Necessity ordered and decreed by the Interstate Commerce Commission authorizing and directing the Eastern Texas Railroad Company to abandon operation of its trains and dismantle and dispose of its railway was:

- (a) Beyond the power which it could constitutionally exercise;
- (b) Beyond its statutory power;

(c) Confiscatory of the contract rights of the State of Texas embraced within the charter of the Eastern Texas Railroad Company and the several statutes and the Constitution of the State of Texas which constitutes a part of the same, and in violation of the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law, and in violation of the rights reserved to the States, and to the State of Texas by the Constitution of the United States and the several Amendments thereof;

(d) That the granting of such certificate was without evidence, or without sufficient evidence to support the same and was arbitrary and unjust and contrary to the true facts and conditions existing
36 as will be hereafter more fully set out. That the Commission in granting the same exercised its authority in such an unreasonable manner that the granting of said Certificate was and is void;

(e) That the granting of such Certificate was against the evidence before the Commission and was and is contrary to the actual facts as found and reported by the Commission itself, although said findings of fact are more restrictive and more favorable to the order than the evidence would warrant and more favorable than the report of the engineer and examiner employed by the Commission who went upon the ground and in the adjacent country and reported the facts as they found them; that for all of these reasons, as well as all others alleged herein, the said Certificate of Public Convenience and Necessity is null and void and should be so held by this Court.

XXII.

Complainants allege, in connection with the foregoing paragraph, that the Eastern Texas Railroad Company is located in and passes through a very fertile region of East Texas; that at the time it was built the country it served was covered by large pine trees which have since been cut out to a great extent and sawed into timber and shipped over said Railroad; that at the present time much of this territory has been converted, and is being converted, into farm lands and highly improved; that substantial farm homes and modern school houses have been and are being built and inhabitants are engaged in raising cotton, corn, cane, melons, and other products extensively, and are also raising a high grade of cattle, hogs, and other domestic animals for shipment, all of which is making the country prosperous
37 and is attracting settlers; that the smaller strips of timber remaining are being sawed into lumber and will be sawed into lumber if said Railroad Company is compelled to operate its

train and furnish shipping facilities; and that from the "cut over" land, which is being cleared and put in cultivation, there is and was at the time of the issuance of the Certificate, a large production of ties and cord wood which will furnish the said Railroad Company freight for shipping through the winter and summer when cotton and other farm products are being moved in smaller quantities,

thereby giving to it continued patronage of freight; and that such products as herein enumerated are of such magnitude, and, if not will soon be, as to pay the necessary operating expenses and yield the defendant Railroad Company and its owners and managers a substantial and reasonable corporate income; that on the line of said Railroad and adjacent to it are gins, mills, banks, mercantile establishments and other industries incident to the highly developed and civilized country which do and will contribute to the furnishing of said Railroad Company a permanent source of revenue guaranteeing the continued prosperity and development of the community it was designed to serve and which it contracted to serve, all of which facts were known to the Interstate Commerce Commission, or could have been known to it by a proper investigation of the application and much of which was called to its attention by the examiner and engineer who made the investigation and reported under said Commission's direction. But, notwithstanding all of these facts and notwithstanding the reports of the examiner and engineer assigned to the investigation, the Interstate Commerce Commission made the order and decree granting the Certificate of Public Convenience and Necessity authorizing and directing the abandonment of the line of Railroad known as the Eastern Texas Railroad contrary to the facts and the law and arbitrarily without reason either in fact or in law.

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XXIII.

Complainants aver that unless relief be granted by this Honorable Court and the Interstate Commerce Commission restrained from making other and further orders in the premises, and unless the defendant Railroad Companies be restrained from taking further action and proceeding with the abandonment and dismantling of said line of Railroad, the Interstate Commerce Commission will issue orders directing that the same be done and the defendant Railroad Companies conspiring together through their directors, officers and attorneys will proceed to abandon said Railroad and dismantle and dispose of same, and, in this connection complainants allege that said Railroad Companies, acting under the authority of the Interstate Commerce Commission, and by reason of the null and void order herein complained of, have ceased operation of trains on said line of railroad in violation of the laws of the State of Texas, in violation of their charter contract and to the great damage and injury of the State of Texas and to the public.

XXIV.

Wherefore, your complainants, the State of Texas, on behalf of its citizens and all the persons residing particularly in the section of the State of Texas served by the Eastern Texas Railroad, and C. M. Cureton, Attorney General for the State of Texas, and personally for himself representing a class as aforesaid, but without an adequate remedy at law and subject to irreparable damage and a multiplicity of suits pray:

1. That this Honorable Court may grant an interlocutory injunction during the pendency of this suit against the defendants, the United States and the Interstate Commerce Commission, the St. Louis, Southwestern Railway Company and the St. Louis, Southwestern Railway Company of Texas and the Eastern Texas Railroad Company, and each of them restraining the enforcement, operation and execution of and the order complained of and the making of any other order to the same end and purpose and setting aside in whole the report, findings and order made 39 and entered by the Interstate Commerce Commission as aforesaid attached hereto as Exhibit "A" and restraining said defendants, their officers, employees, agents and servants and successors in office and each of them from doing anything or beginning any further action or prosecution of any kind or character with the intent and purpose of carrying out or enforcing the operation and execution of said order so made by the Interstate Commerce Commission, or interfering with the enforcement of the laws or Constitution of the State of Texas. That the District Judge of this Honorable Court, upon presentation of this application for an interlocutory injunction, shall immediately call to his assistance to hear and determine this application, two other judges, of whom at least one shall be a Circuit Judge; that this Honorable Court, by an order to show cause shall give at least five days' notice of the hearing of this application of an interlocutory injunction to the Interstate Commerce Commission, to the Attorney General of the United States, the St. Louis, Southwestern Railway Company, the St. Louis, Southwestern Railway Company of Texas and the Eastern Texas Railroad Company by service of subpoena upon the Chairman of the Interstate Commerce Commission, the Attorney General and the proper officers of the railroad companies named defendants, in the manner and form made and provided by statute.

2. That the report, findings and order of the Interstate Commerce Commission herein complained of and attached as Exhibit "A" be set aside in whole and declared illegal, usurpatory and void.

3. That the several sections and subdivisions complained of herein, and particularly Subdivisions 18, 19, 20, 21 and 22 of Section 402 of the Interstate Commerce Commission Act be declared unconstitutional, null and void.

40 4. That this Honorable Court issue writs of mandamus and prohibition as warranted by the principles and usages of law to the defendants herein and to whoever else may be or become necessary or proper parties, ancillary to the jurisdiction herein invoked.

5. That this Honorable Court shall issue a writ of injunction against the defendants, the United States, the Interstate Commerce Commission, the St. Louis, Southwestern Railway Company, the St. Louis, Southwestern Railway Company of Texas, and the Eastern Texas Railroad Company and each of them perpetually restraining

the enforcement, operation and execution of and setting aside in whole the report, findings and order of the Interstate Commerce Commission hereto attached as Exhibit "A", and restraining said defendants, their officers, agents, employes and servants and successors in office and each of them from doing anything or beginning any suit, action or prosecution against the Eastern Texas Railroad Company or either of the other defendant Railroad companies, or against complainants to compel the enforcement, operation and execution of said report, findings and order or interfering with the enforcement of the laws and Constitution of the State of Texas.

Complainants also pray not only for writ of injunction conformably to the prayer, but also that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, the United States, the Interstate Commerce Commission, the St. Louis, Southwestern Railway Company, the St. Louis, Southwestern Railway Company of Texas and the Eastern Texas Railroad Company, commanding them and each of them on a certain day therein to be named to be and appear before this Honorable Court then and there to answer, (but not under oath, answer under oath being expressly waived) all and singular

the several allegations herein made and to perform and abide by such order and direction or decree as may be made in

the premises *with both* upon hearing upon the application for interlocutory injunction and on the final hearing hereof, complainants' prayer being that said order, upon final hearing, be made perpetual and complainants further pray for all such relief in equity as to the Court may seem proper and necessary to meet conditions and preserve unto the State of Texas its several rights herein pleaded and for such relief prayer is ever made.

(Signed)

C. M. CURETON.

THE STATE OF TEXAS

*C. M. Cureton, Personally and as Attorney
General of the State of Texas.*

(Signed)

WALLACE HAWKINS,

(Signed)

TOM L. BEAUCHAMP,

*Assistant Attorneys General,
Solicitors for the Complainants.*

Austin, Texas.

STATE OF TEXAS,

County of Travis:

I, Tom L. Beauchamp, being duly sworn, depose and say that I am an Assistant Attorney General of the State of Texas, and one of the solicitors signing the foregoing Bill of Complaint; that I have read same and know the contents thereof; that so far as the same are allegations of fact they are true of my own knowledge and so far as they are alleged upon advice, information and belief, I believe them to be true.

(Signed)

TOM L. BEAUCHAMP.

Subscribed and sworn to before me in the City of Austin, County of Travis, State of Texas, this 15 day of July, A. D. 1921.

[SEAL.]

VANCE STOCKTON,

*Notary Public in and for
Travis County, Texas.*

EXHIBIT "A."

Interstate Commerce Commission.

Finance Docket No. 4.

In the Matter of Application of the EASTERN TEXAS RAILROAD COMPANY for a Certificate of Convenience and Necessity.

Submitted Sept. 27, 1920. Decided Dec. 2, 1920.

Certificate of Convenience and Necessity Issued Authorizing the Eastern Texas Railroad Company to Abandon its Line of Railway Between Lufkin, Tex., and Kennard, Tex.

E. B. Perkins, Daniel Upthegrove, E. J. Mantom and E. B. Stroud, Jr., for Eastern Texas Railroad Company.

V. L. Brooks, S. N. Townsend, J. R. Painter, L. D. Fairchild, and Clay Stone Briggs, for Protestants.

John C. Box, for Lufkin Chamber of Commerce and Angelina County, Texas.

Report of the Commission.

Division 4, Commissioners Meyer, Daniels, Eastman, and Potter.

By DIVISION 4:

The Eastern Texas Railroad Company, hereinafter called the Eastern Texas, by petition filed June 3, 1920, seeks a certificate of convenience and necessity to permit it to abandon its line of railway in Angelina, Trinity and Houston Counties, Texas.

The Eastern Texas extends from Lufkin, Tex., in a westerly direction, 30.3 miles to Kennard, Tex., and has in addition to this main line track about 4 miles of switch yard and passing tracks.

At Lufkin, its tracks connect with those of the St. Louis 43 Southwestern Railway Company of Texas, hereinafter called the Cotton Belt, the Houston, East & West Texas Railroad, the Groveton, Lufkin & Northern Railway, the Texas Southeastern Railroad, and the Angelina & Neches River Railroad. Applicant has no other railroad connections. It maintains a joint agency with the Cotton Belt at Lufkin, has agency stations at Ratcliff, Tex., and Kennard, and has 6 sidetracks at other points where carload freight may be received or delivered. It owns 1 combination passenger, mail and express car, but no other rolling stock. It rents 1 light locomotive from the Cotton Belt, and pays per diem, under the code rules, for foreign cars while on its line. The only regular serv-

ice it maintains is 1 mixed freight and passenger train daily, except Sunday, between Lufkin and Kennard.

The Eastern Texas was incorporated November 8, 1900, under the general railroad incorporation laws of Texas, to construct a railroad from Lufkin to Crockett, Tex. Its line was constructed to Kennard in 1901 and 1902, and has been continuously operated since, though it has not been extended to Crockett. The company was promoted and financed by individuals interested in the Texas, Louisiana Lumber Company, hereinafter called the lumber company, which is a subsidiary of the Central Coal & Coke Company of Kansas City, Mo. A substantial amount of applicant's right of way was donated to it by the owners of the land. It never received a land grant from the state, nor exercised the right of eminent domain. It was originally authorized to issue \$150,000 capital stock, which amount was increased in 1902 to \$1,000,000. Shares of stock with a par value of

\$154,500, but no bonds, have been issued. On September 44 1, 1906, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, hereinafter called the Southwestern, which, except for the directors' qualifying shares, still holds it. There is substantial identity between the officers of the Eastern Texas and the Southwestern, and the two roads have twice endeavored to consolidate since the stock purchase by the latter. The Texas legislature has refused to authorize the consolidation unless the Eastern Texas would extend its line to Crockett.

Applicant's line was constructed primarily to serve the Lumber Company, which then owned 116,000 acres of pine-timber land near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the south for the production of lumber and forest products. Applicant built numerous tram roads through this timber to connect with its main line. On August 28, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value \$94,604.49, to the lumber company. This sale was made in contemplation of the transfer of the Eastern Texas stock to the Southwestern for bonds of that company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

The Ratcliff mill ceased operation about 1917, and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line.

Applicant contends that since the removal of the mill there is not, and within any reasonable time will not be, enough traffic offered to produce revenue sufficient to pay its operating expenses. It shows that the country it serves is largely cut-over timber land, the soil

45 poor, and the agricultural development very limited except in the vicinity of Ratcliff and Kennard. It points out that the area is sparsely settled, particularly between those two towns where it is estimated that some 600 people live; and that there are no other towns or villages along the line. Ratcliff is said to have a population of 900 and that of Kennard is estimated at 1,200. The timber from some 20,000 acres of land, along applicant's line, owned by the Southern Pine Lumber Company, is transported either by the Texas Southeastern Railroad or the Groveton, Lufkin & Northern

Railway. Three small mills, installed after the abandonment of the Ratcliff mill on account of the then abnormally high prices of lumber and forest products, ceased operating with the decline in the lumber market and were closed at the time of the hearing. The lumber company now owns about 84,000 acres of land surrounding Ratcliff and Kennard on some of which the second growth of timber is said to be of marketable size, but it is not yet in condition to be profitably cut.

About 70 per cent of the traffic handled by the Eastern Texas in 1919 consisted of forest products. Agricultural products totaled less than 10 per cent, and the remaining 20 per cent was made up of mine products, animals, manufactured products, merchandise and other commodities. During each of the 4 years immediately preceding June 30, 1913, mine products, consisting chiefly of bituminous coal used at the Ratcliff mill, exceeded the products of agriculture and animals combined; but the coal tonnage decreased from 6,886 tons in 1913 to 36 tons in 1918, and no coal moved in 1919, nor during the first five months of 1920. The greatest volume of agricultural products moved since 1909 was the 6,592 tons carried in 1914. This traffic has decreased to 2,072 tons in 1919, and 1,038 tons was moved in the first 5 months of 1920. The tonnage of forest products, 46 from 1909 to 1917 ranged from 41,312 tons in 1915 to 66,936 tons in 1917. Only 25,738 tons of this traffic moved in 1918, 14,966 tons in 1919, and 9,958 tons in the first 5 months of 1920. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first 5 months of 1920. Exhibits offered showed a detailed statement of the freight tonnage handled by applicant from 1909 to 1920.

The income of the Eastern Texas shows a corresponding shrinkage since 1912 except for the year 1917. Applicant's gross income for the year ended June 30, 1920, was \$34,210 and its net income \$24,494.21. The corresponding figures for 1917 were \$17,336.95 and \$6,391.57. Its operating expenses exceeded its operating revenues by \$9,699.66 in 1918, by \$4,086.15 in 1919, and by \$24,207.10 in the first 5 months of 1920. The total deficit incurred in 1918 was \$20,128.46, in 1919 it was \$49,362.64, and in January and February of 1920 it was \$10,484.27. The Eastern Texas was under Federal control during 1918, 1919, and the first 2 months of 1920, and its net corporate income was \$2,942.36 in 1918 and \$5,041.74 in 1919. There was a deficit of \$2,033.19 for March, 1920, \$4,455.54 for April, 1920, \$11,703.96 for May, 1920, and applicant estimated its total deficit for the year would be \$68,824.68, exclusive of large expenditures necessary for maintenance of way to place the road in safe operating condition. Applicant's general balance sheet shows a credit balance of \$32,393.68 on May 1, 1920.

Applicant states it will furnish bond in the sum of \$100,000 for the cancellation of all of its outstanding obligations, and that the

Southwestern will guarantee said bond and advance to applicant sufficient funds to pay or secure the payment of wages, accrued taxes, claims, loans, bills payable, and all other lawful obligations outstanding at the date of abandonment, if abandonment is authorized, whether the indebtedness or obligation is or is

not audited and reflected in applicant's account, and whether the claim has been or may later be presented.

Rates to and from Lufkin apply to and from Ratcliff and Kennard on interstate traffic, which comprises approximately 75 per cent of applicant's total tonnage. The divisions between the Eastern Texas and the Cotton Belt are said to be on a more liberal basis than is ordinarily allowed individual short line connections, and applicant contends that it would be impossible to increase its rates or divisions in amount sufficient to make its revenues meet its operating expenses. Its operating ratio was 440 per cent under the rates in effect immediately prior to the increases authorized in Increased Rates, 1920, I. C. C. 220.

The Eastern Texas was originally well laid out from an engineering standpoint, the roadbed being generally level and the grades and curves short. The maximum gradient is slightly more than 1 per cent and the sharpest curve is about 4 degrees. The line was laid with 35 pound steel rails, which are not badly worn, but are both line and surface bent to such an extent that it is said trains cannot safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills, there are 50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition. Six bridges and trestles, with a combined length of 2,282 feet, are in need of immediate renewal to insure safe operation and all of the others require heavy repairs. Embankments and 48 fills have fallen away, particularly at the bridge and trestle approaches, to such an extent that the ties are not properly supported. The slopes of cuts and ditches have fallen in, damaging the drainage so that, in many places, ties are covered with dirt. Applicant estimates that if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss.

The people of the community served by the Eastern Texas object to the granting of the certificate. It is shown that in case of abandonment of the road the nearest railway stations would be Crockett on the International and Great Northern Railway, about 17 miles from Kennard and 20 miles from Ratcliff, and Wells, Tex., on the Cotton Belt, about 20 miles northeast of Ratcliff. The public highways in this territory are not well improved. A fair, graded, clay-and-sand road extends from Ratcliff through Kennard to Crockett, but this road becomes soft during the rainy season. Another road not as good extends from Ratcliff through Sullivan Ferry to Wells. A road from Sullivan Ferry to Lufkin parallels the railroad for approximately 9 miles. Other roads extend from the general territory served by applicant to Morrell, Tex., and Alto, Tex., on the Cotton Belt and to Groveton, Tex., on the Groveton, Lufkin & Northern Railway. Livestock produced in the vicinity of Ratcliff and Kennard hitherto has been driven to Crockett on account of better trans-

portion facilities at that point. If the abandonment is permitted, it will be necessary to dray cotton and forest products a considerable distance to stations, but probably no further than some of the cotton produced in Texas is now hauled. Objectors testified as to the general conditions of the territory and the prospects for further increases in tonnage, but made no definite showing that within any reasonable time there would be sufficient tonnage to pay the 49 operating expenses of the road. To meet their objections, applicant has offered to sell its line to any local interests for \$50,000.

Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of the applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of \$50,000. A certificate and order to that effect will be issued.

Certificate of Public Convenience and Necessity.

At a Session of the Interstate Commerce Commission, Division 4, Held at its Office, in Washington, D. C., on the 2nd Day of December, A. D. 1920.

Finance Docket No. 4.

In the Matter of Application of the EASTERN TEXAS RAILROAD COMPANY for a Certificate of Convenience and Necessity.

Application No. 1 Ab-1.

Be it known, that on the third day of June, 1920, the Eastern Texas Railroad Company, a carrier subject to the Interstate Commerce Act, filed with the Interstate Commerce Commission its application for a certificate of public convenience and necessity to abandon all of its lines of railway between Lufkin, Tex., and Kennard, Tex., situated in the Counties of Angelina, Trinity and Houston, in the State of Texas, pursuant to the provisions of paragraphs 18, 19, 20 and 21, of Section 1 of the Interstate Commerce Act;

That upon receipt of such application the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas and caused said notice to be published 50 for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operates;

That after applicant had made due return to the questionnaire showing the facts and circumstances with respect to such proposed abandonment; and after due notice to all parties in interest, a hearing was held on said application on the 19th day of July, 1920, at Austin, Tex., and on the 26th day of July, 1920, at Ratcliff, Tex., at which all parties in interest were given opportunity to appear and be heard in the premises;

That after said case was submitted, representatives were made to the Commission by the Legislature of Texas by a joint resolution with respect to the jurisdiction of this Commission in these proceedings:

That on the 2nd day of December, 1920, the Commission, by Division 4, made and filed a report containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof;

Now, therefore, upon the record in this proceeding,

The Interstate Commerce Commission hereby certifies, that the present public convenience and necessity permit of the abandonment of all of the lines of railroad of the Eastern Texas Railroad Company as follows, to-wit:

Between Lufkin, Tex., and Kennard, Tex., through the counties of Angelina, Trinity and Houston in the State of Texas;

It is therefore ordered, That the Eastern Texas Railroad Company be, and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated.

51. Provided, however, That the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed \$50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad;

Provided, further, That the Eastern Texas Railroad Company, be, and it is hereby, required to furnish to the Interstate Commerce Commission a good and sufficient bond secured by the St. Louis Southwestern Railway Company in the penal sum of \$100,000, to be approved by the Secretary of the Interstate Commerce Commission, conditioned on the understanding that the said Eastern Texas Railroad Company will, before the expiration of one year after the date of this certificate, adjust, settle and pay all outstanding debts, obligations, judgments, liens, or mortgages, together with all taxes and assessments, Federal, state or municipal, due or to become due, and all claims or judgments for damages to persons or property.

Provided, further, That before suspending operation of said railroad or of any service now being rendered thereon, said Eastern Texas Railroad Company shall give at least thirty days' notice to the public of the date at which such service will be discontinued, said notice to be posted in a conspicuous manner in each station on said line of railroad; and

Provided, further, That the Eastern Texas Railroad Company, when making application for cancellation of tariffs, shall refer to this certificate by title, date and docket number.

By the Commission, Division 4:

[SEAL.]

GEORGE B. McGINTY,

Secretary.

EXHIBIT "B."

Articles of Incorporation of the Eastern Texas Railroad Company.

Know all men by these presents, that the undersigned, each being a subscriber to the stock of the railroad corporation above and hereinafter named, do hereby associate ourselves together and form ourselves into a corporation under the statutes of the State of Texas for the purpose of constructing, owning, maintaining and operating the railroad hereinafter described and to that end and for that purpose have adopted and hereby do adopt and sign the following articles of association:

1. The name of the proposed corporation is and shall be "Eastern Texas Railroad Company."
2. It is intended to construct the proposed railroad from the town of Lufkin, in Angelina County, State of Texas to the City of Crockett, in Houston County, State of Texas. There are no intermediate counties through which it is proposed to construct the same.
3. The place at which the principal business office of the proposed corporation shall be established and maintained is Kennard, Houston County, State of Texas, a place on said line of road.
4. The time of the commencement of the proposed corporation is the first day of November, 1900, and the period of the continuation of said proposed corporation is twenty-five years from and after said last named date.
5. The amount of the capital stock of the corporation is One Hundred and Fifty Thousand Dollars.
6. The names and places of residence of the several persons forming the corporation are as follows:

R. H. Keith,	Kansas City, Missouri.
W. C. Perry,	" " "
John Perry,	" " "
J. C. Sherwood,	" " "
Charles Campbell,	" " "
D. A. Dunn,	Crockett, Texas.
D. A. Nunn, Jr.	" "
John Morrison,	Texarkana, "
W. H. Carson,	" "
W. H. Welch,	" "

7. The names of the members of the first Board of Directors of the corporation are and shall be as follows: to wit:

	W. H. Carson, Texarkana, Texas.
53	W. H. Welch, Texarkana, "
	D. A. Nunn, Crockett, "
D. A. Nunn, Jr.,	Crockett, "
R. H. Keith,	Kansas City, Missouri.
J. C. Sherwood,	" " "
W. C. Perry,	" " "

Each of said directors is a stockholder in said corporation, and the said W. H. Carson, W. H. Welch, D. A. Nunn and D. A. Nunn, Jr., are resident citizens of the State of Texas.

The government of said corporation and the management of its affairs shall be vested in the following named officers or persons, to wit: The Board of Directors, President, Vice-President, Secretary and Treasurer, and Superintendent or Manager to be appointed hereafter by the Board of Directors, from time to time.

8. The number of shares in the capital stock of the proposed corporation is Fifteen Hundred (1500) and the amount of face value of each of said shares is One Hundred Dollars (\$100.00) being a total capital stock of one hundred and fifty thousand dollars (\$150,000.00).

In witness whereof we have hereto subscribed our names this — day of October, A. D. 1900.

R. H. KEITH.
W. C. PERRY.
JNO. PERRY.
J. C. SHERWOOD.
CHAS. CAMPBELL.
W. H. CARSON.
JOHN MORRISON.
W. H. WELCH.
D. A. NUNN.
D. A. NUNN, JR.

STATE OF MISSOURI,
County of Jackson:

Before me, William Newcomb, a Notary Public duly commissioned and acting for said County and State, this day personally appeared R. H. Keith, W. C. Perry, John Perry, J. C. Sherwood and Chas. Campbell, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this the 17th day of October, 1900.

My commission expires March 19th, 1901.

WILLIAM NEWCOMB,
Notary Public.

54 *Amendment to Articles of Incorporation of Eastern Texas Railroad Company.*

Whereas it appears from the surveys made on behalf of this corporation that the line of railroad described in its charter will enter and be constructed and operated for a short distance over and across the most northern portion of Trinity County, State of Texas, and

Whereas, said Trinity County is not named in the charter of the corporation as an intermediate county through which it is proposed to construct the railroad of this corporation

Now therefore, the said charter of the Eastern Texas Railroad Company is hereby amended or changed so that the second paragraph thereof shall read as follows to wit: "2. It is intended to construct the proposed railroad from the easterly boundary of and through the City or town of Lufkin in Angelina County, State of Texas, to and into the town or city of Crockett, in Houston County, State of Texas, and through the intermediate county of Trinity, State of Texas."

In witness whereof, this amendment or change of said charter has been signed by the President and Board of Directors, and attested by the Secretary under the seal of the corporation.

R. H. KEITH,
President.

R. H. KEITH,
W. C. PERRY,
J. C. SHERWOOD,
W. H. CARSON,
W. H. WELCH,
D. A. NUNN,
D. A. NUNN, JR.,

Directors.

Attest:

W. H. WELCH. [SEAL.]
Secretary.

55 STATE OF MISSOURI,
County of Jackson:

Before me, William Newcomb a Notary Public, duly commissioned and acting for said County and State, this day personally appeared R. H. Keith, President of the Eastern Texas Railroad Company, and R. H. Keith, W. C. Perry and J. C. Sherwood, members of the Board of Directors of said railroad company, known to me to be the persons whose names are subscribed to the foregoing instrument and said R. H. Keith acknowledged to me that he executed the same as President and director of said Eastern Texas Railroad Company, and said W. C. Perry and J. C. Sherwood also severally acknowledged to me that he executed the same as a member of the Board of Directors of said railroad company for the uses and purposes therein expressed.

Given under my hand and seal of office this the 9th day of January, 1901.

My term expires Meh. 19th, 1901.

WILLIAM NEWCOMB,
Notary Public.

THE STATE OF TEXAS,

County of Angelina:

Know all men by these presents:

That we, W. W. Fagan, President and Director of Eastern Texas Railroad Company, E. J. Mantooth, W. M. Glenn, W. C. Perry, F. C. Fogarty, E. B. Harris and R. D. Collins, directors constituting the Board of Directors of the Eastern Texas Railroad Company, come, and in compliance with an order or resolution of the stockholders of the Eastern Texas Railroad Company, passed at a meeting called by the directors of said corporation and held at Kennard, in Houston County, Texas, at 9 o'clock a. m. on May 26th, 1902, a copy of which resolution is hereto attached and made part hereof, and amends Article 5 of the charter of the Eastern Texas Railroad Company (of date October 1900, and filed in the Secretary of State's Office November 8th, 1900), so that said article 5 constituting a part of said charter as amended shall hereafter read as follows:

The amount of the capital stock of the Eastern Texas Railroad Company is One Million Dollars; in all other respects said charter to be and remain as it was originally filed.

W. W. FAGAN,
President and Director.

Attest:

E. B. HARRIS,

Secretary of the Eastern Texas Rwy. Co.

E. J. MANTOOTH,
R. D. COLLINS,
F. C. FOGARTY,
W. M. GLENN,
E. B. HARRIS,
W. C. PERRY.

Directors.

THE STATE OF TEXAS,

County of Angelina:

Before me, M. M. Fagan, Notary Public in and for Angelina County, Texas, on this day personally appeared E. J. Mantooth,

57 W. W. Fagan, E. B. Harris, R. D. Collins, W. W. Glenn and F. C. Fogarty, personally known to me to be the persons whose names are subscribed to the foregoing instrument and each acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 30th day of June
A. D. 1902.

[SEAL.]

M. M. FAGAN,
Notary Public, Angelina County, Texas.

THE STATE OF MISSOURI,
County of Jackson:

Before me, Henry C. Page, Notary Public in and for said county and State, on this day personally appeared W. C. Perry, personally known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 8th day of July,
A. D. 1902.

My commission expires April 19, 1904.

[SEAL.]

HENRY C. PAGE,
Notary Public.

* * * * *

*Meeting of the Stockholders of Eastern Texas Railroad Company
Had at Kennard, Houston County, Texas, at 9 o'clock a. m. on
May 26th, 1902.*

The meeting was called to order by W. W. Fagan, President of the company. Thereupon, E. B. Harris, Secretary, exhibited to the meeting, the affidavit of the publishers of three newspapers, one published in Angelina County, one published in Trinity County, and one published in Houston County, Texas, these being the counties through which the line of this railroad runs, to each of which affidavits was attached a printed copy of the notice of this meeting. Said affidavits show that the time, place and purpose of

58 this meeting was advertised in a newspaper in each county through which this road runs or is intended to run, at least sixty days next preceding the day appointed for this meeting. Said affidavits and copies of notices are hereto attached. The president also exhibited evidence showing that he had given notice in writing to each stockholder by serving the same personally or by depositing the same in a post office directed to the post office address of each stockholder severally, postage prepaid, at least sixty days prior to the day appointed for this meeting. The notice delivered or mailed to each stockholder is in the form of a printed notice attached to the affidavits above referred to.

It was unanimously agreed that W. W. Fagan should act as Chairman of the meeting and that E. B. Harris should act as Secretary thereof. Thereupon it was ascertained that all the stock of the corporation was represented at the meeting as follows, to wit:

H. C. Flower, by W. C. Perry, proxy, 1,394 shares.

W. W. Fagan, in person, 100 shares.

W. C. Perry, " " One "

E. J. Mantooth, in person, one share.

R. D. Collins, in person, one share.

W. M. Glenn, in person, one share.

F. C. Fogarty, in person, one share.

E. B. Harris, in person, one share.

Said proxy, was in writing, was dated March 25th, 1902, and was filed with the Secretary.

Mr. Perry then offered the following preamble and resolution, and moved the adoption thereof:

Whereas, the capital stock of this corporation, which now amounts to one hundred and fifty thousand (\$150,000.00) dollars, has been found insufficient for constructing and operating the road, and

Whereas, all existing shares of stock have been paid in full.

Now therefore, be it resolved that the capital stock of this corporation be increased from One Hundred and Fifty Thousand (\$150,000.00) Dollars, its present capital, to one Million (\$1,000,000.00) Dollars that being the amount of increase required for

constructing, equipping and operating the railroad of the corporation between the points mentioned in its charter, to wit: Lufkin, Angelina County, Texas, and Crockett, Houston County, Texas.

Mr. Mantoooth seconded the motion to adopt the resolution, and the same having received the unanimous vote of each stockholder present, and all of the existing stock of the corporation, was by the chair declared to have been adopted.

On motion the meeting adjourned.

W. W. FAGAN,
Chairman.
E. B. HARRIS,
Secretary.

Kennard, Texas, May 31, 1902.

I, E. B. Harris, Secretary of the Eastern Texas Railroad Company do hereby certify that the foregoing page and one quarter of printed matter contains a true and correct copy of a resolution adopted by the stockholders of the Eastern Texas Railroad Company at their regular annual meeting, held at the company's general offices at Kennard, in Houston County, Texas, on the 26th day of May, 1902, to certify which, given under my hand and seal on this the 31st day of May, 1902.

E. B. HARRIS,
Secretary, Eastern Texas Railroad Company.

Sworn to and subscribed before me on this the 31st day of May, 1902.

[SEAL.]

E. J. MANTOOTH,
Notary Public.

THE STATE OF TEXAS,
County of Angelina:

I, M. M. Fagan, Notary Public in and for said county and State, do hereby certify that the foregoing two pages of what purports to be the minutes and the resolution of the stockholders of the Eastern Texas Railroad Company held at Kennard, Houston County, 60 Texas, on May 26th, 1902, is a true copy of the original resolution passed by the stockholders of the Eastern Texas Railroad Company, to certify which given under my hand and seal of office this the 1st day of July, 1902.

[SEAL.]

M. M. FEAGIN,
Notary Public, Angelina County, Texas.

Certificate.

Attorney General's Office.

Austin, August 13th, 1902.

This is to certify that the amendment to articles of incorporation of the "Eastern Texas Railroad Company" were submitted to me on the 13th day of August, 1902, and that having carefully examined the same I find them in accordance with the provisions of Chapter Two, Title Ninety Four of the Revised Statutes of Texas and not in conflict with the laws of the United States or of the State of Texas.

[SEAL.]

C. K. BELL,
Attorney General.

(Endorsed:) Filed for record in the office of the Secretary of State this 26th day of August, 1902. Geo. T. Keeble, Chief Clerk, Acting Secretary of State.

61 *Amendment to the Charter of the Eastern Texas Railroad Company.*

Whereas, Article 3, of the Eastern Texas Railroad Company, provides that the company shall establish and maintain its general offices at Kennard, Houston County, State of Texas, as follows: "The place at which the principal offices of the proposed corporation shall be established and maintained, is Kennard, Houston County, State of Texas," and

Whereas, said general offices of said company are now and have in the past been so established and maintained, and

Whereas, it is found that the operation of said company's railroad and the carrying on of its business from the said town of Kennard is inconvenient; that the interests of the company and the general public will be better served by changing the general offices of said company from Kennard, in Houston County, Texas, to Lufkin, in Angelina County, Texas, and thereto establish and maintain same;

Now, therefore, Article 3, of the said charter of the Eastern Texas Railroad Company be and the same is hereby amended so that said Article 3 thereof, shall read as follows:

The place at which the general offices of the Eastern Texas Railroad Company shall hereafter be established and maintained, shall be in the City of Lufkin, in Angelina County, Texas.

In witness whereof, this amendment or change of said charter has been signed by the President and Board of Directors, and attested by the Secretary under the seal of the corporation.

W. W. FAGIN,

President.

W. C. PERRY,

E. J. MANTOOTH,

W. V. BOLMAN,

R. D. COLLINS,

W. M. GLENN,

JOHN A. SARGENT,

Board of Directors.

Attest:

E. J. MANTOOTH,

Secretary.

62 THE STATE OF TEXAS,
County of Angelina:

Before me, M. M. Feagin, a Notary Public in and for Angelina County, Texas, on this day personally appeared W. W. Fagan, E. J. Mantooth, W. V. Bolman, R. D. Collins and W. M. Glenn, each personally known to me to be the persons whose names are subscribed to the foregoing instrument on the reverse side hereof, and each acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this September 30th A. D., 1902.

[SEAL.]

M. M. FEAGIN,

Notary Public, Angelina County, Texas.

THE STATE OF MISSOURI,
County of Jackson:

Before me, William Newcomb, a Notary Public in and for Jackson County, Missouri, on this day personally appeared W. C. Perry and Jno. A. Sargent, both personally known to me to be the persons whose names are subscribed to the foregoing instrument on the reverse side hereof, and each acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this October 7th A. D. 1902. My commission expires March 2, 1905.

[SEAL.]

WILLIAM NEWCOMB,

Notary Public, Jackson County, Missouri.

Certificate.

Attorney General's Office.

Austin, October 14th, 1902.

This is to certify that the amendment to Articles of Incorporation of the Eastern Texas Railroad Company, were submitted to me on the 14th day of October, 1902, and that having carefully examined the same I find them in accordance with the provisions of Chapter Two, Title Ninety-four of the Revised Statutes of Texas, and not in conflict with the laws of the United States or of the State of Texas.

[SEAL.]

C. K. BELL,
Attorney General.

(Endorsed:) Filed for record in the office of the Secretary of State this 14th day of October, 1902. Geo. T. Keeble, Chief Clerk, Acting Secretary of State.

63^{1/2} [Endorsed:] No. Eqty. 42. In the District Court of the United States, Eastern District of Texas, State of Texas et al. vs. The United States et al. Petition and bill of complaint. U. S. District Court. Filed September 10, 1921. J. R. Blades, Clerk, by W. R. Chalker, Deputy. Attorney General of Texas, Solicitor for Plaintiffs.

(2.)

In the District Court of the United States for the Eastern District of Texas, Texarkana Division.

In Equity.

No. 42.

THE STATE OF TEXAS et al.

vs.

UNITED STATES et al.

In Chambers, at Texarkana, Texas, This 10th Day of September, 1921.

The attached bill was this day presented to me, and it is ordered that the same be filed, and be set for hearing in the court room of the Federal Building at Texarkana, Texas on Wednesday the 21st day of September 1921 at 10 o'clock A. M. The Clerk is directed to cause a copy of this order to be served upon each of the defendants who at said time and place may show cause why the relief prayed for should not be granted. One of the judges of the Circuit Court

of Appeals of the Fifth Circuit, and Judge Duval West, judge of the District Court of the United States of the Western District of Texas will be called to assist in the hearing of this matter.

T.

W. L. ESTES,
Judge.

[Endorsed:] (2.) Equity No. 42. State of Texas et al. vs. United States et al. Order calling judges, etc. U. S. District Court. Filed September 10, 1921. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

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(3.)

United States District Court, Eastern District of Texas, at Texarkana.

In Equity.

No. 42.

THE STATE OF TEXAS and C. M. CURETON, Personally and as Attorney General for the State of Texas, Plaintiffs,

v.

THE UNITED STATES and EDGAR E. CLARK, CHARLES C. McCHORD, Balthaser H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Aitchison, Joseph B. Eastman, Mark W. Potter, John J. Esch, E. I. Lewis, and J. W. Campbell, Constituting the Interstate Commerce Commission; H. M. Daugherty, Attorney General of the United States; The Eastern Texas Railroad Company, The St. Louis Southwestern Railway Company of Texas, and The St. Louis Southwestern Railway Company, Defendants.

Motion to Dismiss as to Attorney General.

H. M. Daugherty, Attorney General of the United States, by his counsel, now comes and moves the court to dismiss the petition and bill of complaint in the above-entitled cause as to him, at the cost of the plaintiffs.

As grounds for this motion it is shown:

1. The Attorney General is neither a necessary nor proper party to the petition and bill of complaint.
- 66 2. No relief is prayed against the Attorney General either as an individual or as an officer of the United States.
3. The Attorney General either as an individual or as an officer of the United States, is not subject to suit and process as a defendant to the petition and bill of complaint in manner and form as herein undertaken.

Wherefore, defendant prays that his motion be sustained and the petition and bill of complaint dismissed as to him.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
E. J. SMITH,
United States Attorney, Eastern District of Texas.

[Endorsed:] (3.) Equity No. 42. In the United States District Court for the Eastern District of Texas. State of Texas et al. vs. The United States et al. Motion to dismiss as to Attorney General. Filed September 21, 1921. U. S. District Court. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

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(4.)

In the United States District Court for the Eastern District of Texas,
at Texarkana.

In Equity.

No. 42.

THE STATE OF TEXAS et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA et al., Defendants.

Order.

On motion of counsel for the United States, counsel for plaintiffs consenting, it is ordered as to H. M. Daugherty, Attorney General of the United States, that the petition and bill of complaint be and the same is hereby dismissed without costs.

By the Court.

WALKER,
Circuit Judge;
ESTES,
DUVAL WEST,
District Judges,
By JUDGE WEST,
For the Court.

September 21, 1921.

[Endorsed:] (4.) Equity No. 42. In the United States District Court for the Eastern District of Texas at Texarkana. The State of Texas et al., vs. United States of America et al. Order. Filed September 21, 1921. U. S. District Court. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

United States District Court, Eastern District of Texas, at Texarkana.

In Equity.

No. 42.

THE STATE OF TEXAS and C. M. CURETON, Personally and As Attorney General for the State of Texas, Plaintiffs,

v.

THE UNITED STATES and EDGAR E. CLARK, CHARLES C. McCHORD, Balthasar H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Aitchison, Joseph B. Eastman, Mark W. Potter, John J. Esch, E. I. Lewis and J. W. Campbell, Constituting the Interstate Commerce Commission; H. M. Daugherty, Attorney General of the United States; the Eastern Texas Railroad Company, the St. Louis Southwestern Railway Company of Texas, and the St. Louis Southwestern Railway Company, Defendants.

Motion of the United States to Dismiss the Petition and Bill of Complaint.

United States of America, defendant, by its counsel now comes and moves the court to dismiss the petition and bill of complaint in the above-entitled cause at the cost of the plaintiffs.

As grounds for this motion it is shown—

1. The bill of complaint is vague, indefinite, uncertain, and insufficient, in this, to wit:

(a) It does not contain a short and plain statement of the grounds upon which the jurisdiction of the court depends as prescribed by Equity Rule 25.

(b) It does not appear from the face of the petition and bill of complaint or otherwise that the court has jurisdiction to entertain the same at the suit of the State of Texas.

(c) The certificate of public convenience and necessity is not an order of the Interstate Commerce Commission within the meaning of Commerce Court Act (36 Stat. 539) or Urgent Deficiencies Act (38 Stat. 219) which provide for jurisdiction and venue of suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission.

(d) The petition and bill of complaint is framed on the theory that the Act to Regulate Commerce, as amended, the Transportation Act of 1920, and the certificate of public convenience and necessity made and issued by the Interstate Commerce Commission in pursuance thereof after a full hearing are all in violation of the Constitution and laws of the State of Texas, when neither the Commerce Court

Act (36 Stat. 539) nor Urgent Deficiencies Act (38 Stat. 219) provides for jurisdiction and venue of suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission as in violation of the Constitution and laws of the State of Texas.

(e) The certificate of public convenience and necessity of the Interstate Commerce Commission is directed to the Eastern Texas Railroad Company operating within the State of Texas and is not directed to the State of Texas, or either of the plaintiffs, neither of whom, by reason whereof, has any standing in this court to maintain 70 the petition or bill of complaint against the United States.

(f) There is a misjoinder of parties and alleged causes of action in that the plaintiffs seek to maintain a cause of action in the public interest against the United States of America and at the same time they seek to maintain a cause of action in the public interest against the Eastern Texas Railroad Company and other railroad companies operating in the State of Texas, and other defendants. The plaintiffs have thus confounded an attempted suit against the United States with an attempted suit against other parties.

2. The petition and bill of complaint with the exhibits attached thereto and made a part thereof is without equity on its face, and does not state any cause of action against the defendant, and the court may not grant the relief prayed or any part of the same.

3. In the absence of a certified copy of the record of the evidence and proceedings before the Interstate Commerce Commission, the presumption that the certificate of public convenience and necessity rests on substantial evidence and was regularly made is conclusive.

4. The report of the Interstate Commerce Commission and certificate of public convenience and necessity entered in pursuance thereof were made and entered after full hearing and due notice, and rest on substantial evidence adduced in the record made by the parties, and the matters and things alleged in the petition and bill of complaint and sought to be put in issue are foreclosed by the findings of fact.

5. It appears from the petition and bill of complaint with the exhibits attached thereto and made a part thereof that the certificate of public convenience and necessity of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the Acts to Regulate Commerce and the Transportation Act, 1920, and that it was regularly made and issued by the Commission in a proceeding properly pending and conducted.

6. The plaintiffs have not in and by the petition and bill of complaint shown that in making the certificate of public convenience and necessity the Interstate Commerce Commission transcended the power conferred upon it by the statute or violated any right of the plaintiffs protected by the Constitution of the United States or any other right of the plaintiffs over which the court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the petition and bill of complaint, more fully to be pointed out on the hearing hereof, defendant prays that its motion be sustained, and for such other and further action or order as may be appropriate.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
E. J. SMITH,
United States Attorney, Eastern District of Texas.

[Endorsed.] (5.) Equity No. 42. In the United States District Court for the Eastern District of Texas, at Texarkana. State of Texas et al., vs. United States et al. Motion of the United States to dismiss the petition and bill of complaint. Filed September 21, 1921. J. R. Blades, clerk. U. S. District Court, by W. R. Chalker, deputy.

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(6.)

In the District Court of the United States for the Eastern District of Texas.

In Equity.

No. 42.

THE STATE OF TEXAS et al., Plaintiffs,
v.

THE UNITED STATES et al., Defendants.

Motion to Dismiss.

Now comes the Interstate Commerce Commission, which for convenience will be referred to hereinafter as the Commission, one of the defendants in the above-entitled cause, and moves the court to dismiss as to it the petition and bill of complaint filed herein for the following reasons:

1. That it affirmatively appears in the petition and bill of complaint, hereinafter termed the bill of complaint, that the certificate of convenience and necessity, set out in Exhibit A thereof, made by the Commission on December 2, 1920, is not an order of the Commission within the meaning of section 1 of an act approved June 18, 1910, 36 Stat., 539, and of the subdivision headed "Judicial" of an act approved October 22, 1913, 38 Stat., 208, 219, under which plaintiffs seek to maintain this suit.

2. That the said bill of complaint does not state a cause of action entitling the plaintiff to the relief, or any part thereof, prayed for in said bill of complaint.

INTERSTATE COMMERCE COMMISSION,
By WALTER McFARLAND,
Counsel.

P. J. FARRELL, *Of Counsel.*

73 *Answer of the Interstate Commerce Commission.*

Without waiving its objection to the sufficiency of the bill of complaint, and now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill of complaint, the Commission, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering paragraphs I to XXIII, inclusive, of the bill of complaint, this defendant, which for convenience will be referred to hereinafter as the Commission, admits that an application for a certificate of convenience and necessity authorizing it to abandon its lines of railway between Lufkin, Tex., and Kennard, Tex., was filed with the Commission by the Eastern Texas Railroad Company on June 3, 1920, and was docketed as Finance Docket No. 4, as alleged in the bill of complaint; that thereupon the Commission instituted a proceeding of investigation into the matters presented by the application; that the Commission caused notice of the application to be given to and a copy to be filed with the Governor of the state of Texas and caused said notice to be published for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operated; that the case was duly heard; that briefs were filed on behalf of the interested parties; that the case was argued before the Commission; and that the Commission made a report and certificate of convenience and necessity in the premises on December 2, 1920, which, with the exception of certain immaterial typographical errors, is as set forth in

Exhibit A of the bill of complaint.

74 The Commission alleges that the findings made in said report and certificate of December 2, 1920, were, and are, and that each of them was, and is, fully supported and justified by the record before the Commission in that proceeding.

The Commission further alleges that in making said report, findings and certificate it considered and weighed carefully in the light of its own knowledge and experience every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by allegations in the bill of complaint in this suit.

The Commission further alleges that said report, findings and certificate were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making them it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and that the Commission denies each of, and all, the allegations to the contrary contained in said bill of complaint.

II.

Except as herein expressly admitted, the Commission denies the truth of each of, and all, the allegations contained in the bill of complaint herein, in so far as they conflict either with allegations in this answer, or with either the statements or conclusions of fact included in the Commission's said report and certificate, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove, as this honorable court shall direct, and therefore prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By WALTER McFARLAND,
Counsel.

P. J. FARRELL,
Of Counsel.

75 CITY OF WASHINGTON,
District of Columbia, ss:

B. H. Meyer, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named defendant, and makes this affidavit on behalf of said Commission, that he has read the foregoing answer and knows the contents thereof, and that the same is true.

B. H. MEYER.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 17th day of September 1921.

[SEAL.]

ALFRED HOLMEAD,
Notary Public.

[Endorsed:] (6.) Equity No. 42. In the District Court of the United States for the Eastern District of Texas. Motion to Dismiss. State of Texas et al. vs. United States et al. Filed September 21, 1921. U. S. District Court. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

In the District Court of the United States for the Eastern District of Texas, at Texarkana,

In Equity,

No. 42.

THE STATE OF TEXAS et al., Plaintiffs,

vs.

THE UNITED STATES et al., Defendants,

Motion to Dismiss.

Now come St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, and the Eastern Texas Railroad Company, and move the court to dismiss as to each of said defendants the petition and bill of complaint filed herein, for the following reasons, to-wit:

1.

Because it affirmatively appears in said petition and bill of complaint that this is a suit to set aside an order of the Interstate Commerce Commission granting the Eastern Texas Railroad Company authority to abandon its line of railroad, and that the United States is the only necessary or proper party defendant to said suit, and that neither the said St. Louis Southwestern Railway Company, the St. Louis Southwestern Railway Company of Texas, nor the Eastern Texas Railroad Company are necessary or proper parties thereto.

2.

Because it affirmatively appears in said petition and bill of complaint, that this is a suit to set aside an order of the Interstate Commerce Commission as hereinabove alleged, and that the plaintiff in said petition and bill of complaint seeks to join therewith a cause of action for the breach of an alleged contract between the plaintiff, State of Texas, and the said Eastern Texas Railroad Company, and further seeks to have adjudicated the question as to whether 77 or not there has been a consolidation between the said defendants, which said alleged cause of action can not be joined with the said action to set aside the order of the Interstate Commerce Commission.

3.

Because said petition and bill of complaint does not state any causes of action against the said defendants, or either of them, or that plaintiff is entitled to the relief, or any part thereof, as prayed for in said bill of complaint.

Wherefore, said defendants and each of them pray that an order be entered dismissing said defendants and each of them as parties defendant to this suit.

Respectfully submitted,

(Signed)

E. B. PERKINS,

DANIEL UPTHEGROVE,

KING, MAHAFFEY, WHEELER,

E. J. MANTOOTH,

Solicitors for Defendants.

78 United States District Court, Eastern District of Texas.

In Equity.

No. 42.

THE STATE OF TEXAS et al., Plaintiffs,

vs.

THE UNITED STATES et al., Defendants.

Final Order.

This cause came on to be heard and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to-wit:

1. That the motion filed by the United States to dismiss the petition and bill of complaint be and the same is hereby sustained and that the petition and bill of complaint be and the same is hereby dismissed, to which ruling of the court the plaintiffs, by their counsel, then and there in open court, objected and excepted.

2. That the motion filed by the Inter-State Commerce Commission to dismiss the petition and bill of complaint be and the same is hereby sustained, and that the petition and bill of complaint be and the same is hereby dismissed, to which ruling of the court the plaintiffs, by their counsel, then and there, in open court, objected and excepted.

3. And thereupon, in open court, the plaintiffs, by their counsel, prayed an appeal to the Supreme Court of the United States from

the foregoing final order, which appeal was in open court allowed as prayed.

By the Court:

(Signed)

R. W. WALKER,
Circuit Judge.
W. L. ESTES,
DUVAL WEST,
District Judges.

[Endorsed:] S. Equity No. 42. United States District Court for the Eastern District of Texas. State of Texas et al. vs. United States et al. Final order. U. S. District Court. Filed September 21, 1921. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

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(9.)

In Equity.

No. 42.

THE STATE OF TEXAS et al.

vs.

THE UNITED STATES et al.

Assignments of Error.

Now come the Plaintiffs herein and file the following Assignments of Error upon which they will rely upon their prosecution of this appeal, from the order of the court granting the motion of the defendants to dismiss plaintiffs' bill, made and entered herein on the 21st day of September, A. D. 1921.

1.

That there is manifest error on the face of the record in that the court erred in holding there was no equity in plaintiffs' bill.

2.

There was manifest error on the face of the record in that there were other parties defendant than the United States and the Interstate Commerce Commission, to wit: The St. Louis Southwestern Railway Company, the St. Louis Southwestern Railway Company of Texas and the Eastern Texas Railway Company, and the bill against them should not have been dismissed on the motion of the United States and the Interstate Commerce Commission.

3.

That there is error in the court's ruling because plaintiffs — thereby denied the right to attack the *order* of the Interstate Commerce Commission in the manner prescribed by law.

Wherefore, appellants pray that said decree be reversed and that
 80 said District Court for the Eastern District of Texas be
 ordered and directed to re-instate plaintiffs' bill and hear same
 on its merits.

C. M. CURETON,

Attorney General:

WALACE HAWKINS,

TOM L. BEAUCHAMP,

Assistant Attorneys General,

Solicitors for Plaintiffs.

[Endorsed:] (9.) Eq. 42. Assignment of Errors. United States District Court, Eastern District of Texas. State of Texas et al. v. United States et al. U. S. District Court. Filed September 21, 1921. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

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Clerk's Certificate.

J. J. R. Blades, Clerk of the United States District Court for the Eastern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a full, true and complete transcript of record, assignments of error and all proceedings in cause No. 42, in Equity, wherein the State of Texas et al. are plaintiffs and the United States et al. are defendants, as fully as same remains on file and of record in my office at Texarkana.

Witness, my hand officially and the seal of said court, at Texarkana, Texas, this the 22nd day of September, A. D. 1921.

[Seal of United States District Court, Eastern District of Texas.]

J. R. BLADES,

Clerk,

By W. R. CHALKER,

Deputy.

Endorsed on cover: File No. 28,518. E. Texas D. C. U. S. Term No. 503. The State of Texas and C. M. Cureton, personally and as attorney general for the State of Texas, appellants, vs. The United States of America, Charles C. McChord et al., constituting the Interstate Commerce Commission, et al. Filed October 3d, 1921. File No. 28,518.

No.....

In the Supreme Court of the United States

OCTOBER TERM, 1921

THE STATE OF TEXAS ET AL.

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS FROM AN ORDER REFUSING AN INTERLOCUTORY INJUNCTION SUSPENDING AND RESTRAINING THE ENFORCEMENT OF AN ORDER MADE BY THE INTERSTATE COMMERCE COMMISSION AND DISMISSING PLAINTIFF'S BILL.

MOTION TO ADVANCE HEARING.

Now comes the State of Texas and C. M. Cureton, its Attorney General, acting in his official capacity and as a citizen of the State of Texas, appellants in the above styled cause, and move the court to advance the setting of said cause and hear argument herein at the same time argument is heard in the case of The State of Texas, Appellant, vs. Eastern Texas Railroad Company et al., No. 298, for the October term, 1921, and for cause appellants submit:

(1) The matters at issue in the two cases are similar and relate to the identical subject matter.

(2) Cause No. 298, hereinafter referred to as the Eastern Texas Case, was appealed from the District Court for the Western District of Texas from an order dissolving a temporary injunction and finding against appellant on the law and precluding the introduction of testimony. Said cause was by this honorable court assigned for argument for October 10, 1921, upon the granting of a temporary restraining order compelling appellees to keep the property in question in status quo pending appeal. Thereafter the State of Texas filed proceeding in the District Court for the Eastern District of Texas in accordance with the Act of October 22, 1913, known as the "District Court Act" for the purpose of suspending and setting aside an order of the Interstate Commerce Commission, dated December 2, 1920, denominated a certificate

of public convenience and necessity authorizing the Eastern Texas Railroad Company to abandon operation of its main line and dismantle and remove its tracks and dispose of its physical properties.

In the Eastern Texas case, the State of Texas had brought suit and obtained an injunction in a district court of Texas to restrain the Eastern Texas Railroad Company and its officers, under the laws of the State of Texas, from abandoning operation and, thereafter, upon the issuance of the certificate referred to by the Interstate Commerce Commission, the cause was transferred to the Federal court for the Western District of Texas, where, upon motion of the defendant railroad company, the restraining order granted by the State court was dissolved on the ground that the order of the Interstate Commerce Commission, directing the abandonment of the railroad, was mandatory and had superseded the laws of the State of Texas, being the order complained of on appeal.

Upon the hearing of plaintiff's application for interlocutory injunction in the case of The State of Texas vs. United States et al., before Circuit Judge Walker and District Judges Estes and West at Texarkana, in the Eastern District of Texas on the 21st day of September, 1921, the United States was represented by the Department of Justice and the Interstate Commerce Commission by its counsel, who appeared and moved the dismissal of the bill on the ground that there is no equity in it and, in presenting said motion, concurred in the views of the State of Texas in the case formerly appealed from the Western District of Texas above referred to in the construction of the statute giving the Interstate Commerce Commission directions to issue certificates of convenience and necessity authorizing the abandonment of railroads and thereby acknowledged that said certificate of convenience and necessity as to abandonments was and is only a permissive order and not directory; that by reason of its nature, no harm was done to plaintiffs and injunction to restrain the order would not lie. Two other defendants, the St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas also filed motion to dismiss the plaintiff's bill on the ground that

the suit was brought to set aside an order of the Interstate Commerce Commission granting the authority to the Eastern Texas Railroad Company to abandon its line of railroad, and that neither of said defendants were parties to said order and neither are necessary or proper parties to said suit. The court, as thus constituted, granted the motion of the United States, of the Interstate Commerce Commission and of the defendant railroads dismissing plaintiff's bill. From this order appeal was taken.

Thus it was held that the order and certificate authorizing the abandonment of the Eastern Texas Railroad was only permissive and not mandatory, a view contrary to that held by the judge of the Western District of Texas in the Eastern Texas case, being No. 298, October term, 1921.

(3) The parties to each cause are not identical, yet all parties to the Eastern Texas case, except the officers of the company, are also parties to this suit, and the decision in one case will determine the issues in the other and the hearing of argument on both cases at the same time is necessary to a complete understanding and discussion of all the issues involved and will eliminate the time and expense of two hearings to the advantage of the court and of the litigants.

Wherefore, appellants pray this court to grant a proper order fixing argument in both causes at the same time, either by advancing the last case appealed or postponing the argument in the first case as to the court may seem proper, and in this connection appellants suggest advancement for hearing of the case of the State of Texas vs. United States, the last on appeal.

STATE OF TEXAS,
C. M. CURETON,
Attorney General.
By C. M. CURETON,
Attorney General.
WALACE HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorneys General,
Solicitors for Appellant.

STATE OF TEXAS,
COUNTY OF TRAVIS.

Tom L. Beauchamp, being duly sworn, deposes and says that he is one of the solicitors for the appellants named in the foregoing motion and is familiar with the facts therein set forth; and affiant further states that the facts stated in the foregoing application are true as therein stated.

.....

Subscribed and sworn to before me on this the first day of October, A. D. 1921.

VANCE STOCKTON,
Notary Public in and for Travis County, Texas.

We, the undersigned, as attorneys for appellees, acknowledge service of the foregoing motion and agree to the granting of the motion and ask that the two causes named be argued at the same time.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE STATE OF TEXAS ET AL.

v.

| No. 563.

THE UNITED STATES OF AMERICA ET AL.

*APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF TEXAS.*

SUGGESTIONS ON APPELLANTS' MOTION TO ADVANCE.

On October 3, 1921, the transcript was filed with the clerk of this court, obviously too late for the appeal to be argued with No. 298, *The State of Texas v. Eastern Texas Railroad Company et al.*, fixed for October 10, 1921, to which the United States is not, and never was, a party. Nevertheless, as the suit in the district court in the instant case was styled a suit to set aside an order of the Interstate Commerce Commission, the hearing on the appeal is entitled to priority over other cases (Commerce Court act, 36 Stat. 539, 542; urgent deficiencies act, 38 Stat. 219, 220).

The Solicitor General concurs in that part of the closing paragraph of the motion to advance filed by counsel for appellants which suggests that the

argument in No. 298, *supra*, be postponed to a later date and that the argument in the instant case be advanced to the same date, to the end that the two appeals may be argued together.

JAMES M. BECK,

Solicitor General.

OCTOBER, 1921.



In the Supreme Court of the United States

OCTOBER TERM, 1921

IN EQUITY

No.

THE STATE OF TEXAS ET AL., APPELLANTS,

vs.

UNITED STATES ET AL., APPELLEES.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

INTRODUCTORY STATEMENT.

This is an appeal from an order entered on the 21st day of September, 1921, by the District Court of the Eastern District of Texas, Circuit Judge Walker and District Judges West and Estes sitting, upon the application of the State of Texas, C. M. Cureton as Attorney General and in his individual capacity against the United States, the Interstate Commerce Commission and the Eastern Texas Railroad Company, the St. Louis Southwestern Railway Company of Texas, and the St. Louis Southwestern Railway Company, brought for the purpose of suspending and setting aside an order of the Interstate Commerce Commission, made and entered on the 2nd day of December, 1920, authorizing the Eastern Texas Railroad Company to abandon operation of its line of railway situated within the State of Texas and between the towns of Lufkin and Kennard.

The bill alleges ownership of the stock of the Eastern Texas Railroad Company by the St. Louis Southwestern Railway Company and a conspiracy between the three railroads named as de-

fendants to abandon operation of the road and asking an interlocutory injunction against each of the defendants named restraining them from carrying out the order of the Interstate Commerce Commission until the suit may be heard on its merits.

The suit was filed in accordance with the Act of October 23, 1913, known as the "District Court Act." No answer was filed by either of the defendants, but a motion was presented by the United States and the Interstate Commerce Commission asking that the bill be dismissed. Motion was also filed by the St. Louis Southwestern Railway Company of Texas and the St. Louis Southwestern Railway Company asking that suit be dismissed as to them on the ground that they were not parties to procuring the order from the Interstate Commerce Commission complained of, and, therefore, not proper parties to this suit. The motions of the United States and the Interstate Commerce Commission alone were presented and argued before the court, whereupon the court entered an order granting all of the motions, including that of the two railroad companies. Complainants then and there, in open court, duly excepted, filing their bills of exception and gave notice of appeal to the Supreme Court of the United States. The order of the court recited this fact and allowed the appeal.

Complainants' bill is presented in the record and the question in this case is whether or not the court erred in granting the motions of the several defendants as prayed for and in the terms set out in its order, as complained of in the bills of exception presented by plaintiffs.

ADDITIONAL STATEMENT.

The subject matter of this suit is in litigation in an action between the State of Texas and the Eastern Texas Railway Company in which its officers and attorneys are joined as parties defendant, said cause being No. 298 on the docket of this court for the October term, 1921. Motion has been filed to advance the hearing in this case for the same time that argument is had in the other case referred to.

The same questions of law, relative to the authority of the Inter-

state Commerce Commission, are presented in each case. Questions of procedure will be raised in this case not involved in the former appeal and likewise the former appeal has a question of jurisdiction not involved in this case.

THE LAW SUPPORTS THE BILL.

The District Court Jurisdiction Act, passed by Congress and approved October 23, 1913 (38 S. L., 219) is the authority for filing this bill. Omitting that portion of the act abolishing the Commerce Court, we quote:

“The venue of any suit hereafter brought to enforce, suspend or set aside in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party, or any of the parties, upon whose petition the order was made.” * * *

“No interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission, shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge and unless the majority of said three judges shall concur in granting such application. When such application, as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States and to such other persons as may be defendants in the suit.” * * *

“The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest possible date after the expiration of the notices hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice of hearing, an interlocutory injunction, in

such case, if such appeal be taken within thirty days after the order in respect of which complaint is made, is granted or refused; and upon final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

The foregoing act unquestionably authorizes the bill as against the United States, the Interstate Commerce Commission and "other parties."

The Eastern Texas Railroad Company was the applicant before the Interstate Commerce Commission. It was, therefore, a proper party defendant. The other two roads named as defendants were, according to the bill, the major portions of the same system of railroads as the Eastern Texas, one being the owner and the other a subsidiary of the owning company. They had acted with the Eastern Texas Railroad in obtaining the order complained of, owned the stock of the road, elected its officers and directors and operated its trains. They made the bond required of it by the Interstate Commerce Commission. On the face of the bill they were proper parties.

In presenting their motion to dismiss the bill, defendants, the United States and the Interstate Commerce Commission, interposed as their reason that the order complained of was not an affirmative order by the Interstate Commerce Commission, but was only negative, not mandatory but only permissive. That nothing was to be done by the Interstate Commerce Commission, under the order for which it could be restrained, its act was complete and no order that it had passed or could pass under the act authorizing it could harm the State of Texas nor its Attorney General, and, therefore, there was no equity in the bill.

In this interpretation of the act, appellants agree. Our view in this connection is consistent with the argument heretofore made on the same subject, but it is in conflict with the interpretation given the act by the defendant railroad companies when they proceeded to abandon the road without securing permission from the State of Texas, and the court should have granted the interlocu-

tory injunction as to the railroad company. The act was a mere permit from the Interstate Commerce Commission and not authority. The act authorizing it was passed for the purpose of protecting interstate commerce and not for the purpose of destroying intrastate commerce. We republish herewith the argument presented by the State of Texas on the interpretation of the act in the case of the State of Texas, Appellant, vs. Eastern Texas Railway Company et al., Appellees, being No. 298 for the October term, 1921, of this court, the section of the brief referred to being found on pages 11 to 17 and reading as follows:

A proper interpretation of paragraphs (18), (19), (20) and (21) of Section 1 of the Transportation Act does not exclude the authority of the State, but only directs the Interstate Commerce Commission to grant its authority, under conditions to be prescribed by it, for the withdrawal by the carrier from engagement as an interstate carrier.

In this connection we call attention to the language employed by Congress in the Transportation Act, which the railroad companies contend excludes the authority of the State:

“From and after issuance of such certificate, and not before, the carrier by railway may, *without securing approval other than such certificate*, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby.” (Paragraph (20), of Section 1.) (Italics ours.)

In order to properly understand the meaning of this language, it is necessary to discuss the principle of the act and the purpose for which it was enacted.

The United States had taken charge of the railroads of the country and operated same to meet the emergencies of the war. Unusual legislation had been passed which could be held constitutional only on the ground that an emergency demanded it. The roads are now to be turned back to the owners. The theory asserted itself in Congress that the roads were in a weak and helpless condition, and in order to sustain them it would be necessary

for the government to extend a helping hand. The Interstate Commerce Commission was delegated to perform this service. It was authorized, under its interpretation of the act to divide the country into such number of groups as it may see fit and fix such rates as may be necessary for passengers and freight as would bring to all of the railroads within the group a specified return on the valuations found for all the carriers. Thus was linked together the entire system, and Congress foresaw that in order to foster and protect the carriers, it would be necessary to make immediate extensions and connections. Provisions were made by Congress to aid in financing such extensions in order that certain helpless carriers may have their lines extended, that they may perform fully the service and realize to the fullest extent the income available to it. At the same time Congress seemed to have recognized that certain carriers would be a burden to the entire group because they would not earn more than the operating expense, and their values added to the total values would demand the fixing of a higher rate for all of the territory to which such carrier would not contribute its proportionate share. It was, therefore, provided that such carrier may be relieved either upon their own application or upon the Commission's initiative from engaging in interstate commerce—as expressed by counsel in arguing the case in the court below, there would be dead limbs which a good husbandman would see fit to prune from its tree. To this theory, and thus far, we subscribe. We assert, however, that when Congress had withdrawn interstate commerce from such carriers, by giving permission for their abandonment, the full purpose of the act has been accomplished and no further action was authorized. Let us look to this act and other acts of Congress for its interpretation.

Paragraphs (18), (19) and (20) provide alike for the extension and abandonment by carriers of their lines. If the language used in these paragraphs is complete and sufficient to exclude the State from any authority in the abandonment of the road, it is likewise sufficient to exclude such authority in the extension by a carrier of its line. Congress was not satisfied, however, to stop here, for

it may be necessary to extend the line in order to properly foster and properly regulate interstate commerce, and to this end paragraph (21) was added, giving to the Commission power to authorize or require carriers to provide themselves with adequate facilities or to extend their line or lines, making provision for the enforcement of such order. Section (21) has no application to abandonments, but solely to extensions.

Under the authority given, it may be stated that the power of the State to forbid extensions has been superseded. It may be, with good reason argued also, that extensions become necessary to interstate commerce whether agreeable to the State in which they are made or not, and this given as a reason for the insertion of paragraph (21). If that same argument applied to abandonments, Section (21) should then have included abandonments, as well as extensions, but it does not. To our mind this is sufficient to answer the argument that the State is excluded from any activity by the provision quoted from paragraph (20), but that is not all.

The language employed in paragraph (20), to wit: "without securing approval other than such certificates," is not the language customarily used by Congress when it excludes the authority of a State to act, nor is it sufficient to overcome the effect of the language used in paragraph (17) relating to the same subject. From it we quote:

"Provided, however, that nothing in this act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

Certainly this language shows Congress recognizes, in the act, the police powers of the State. The interpretation sought by appellees, and that given by the court below, recognizes no vestige of right or power in the State, but, on the contrary, annihilates the subject of its control. It is our contention that to overcome this provision and strip the State of all rights in the regulation of its intrastate commerce and its carriers the language immedi-

ately following this must be at least as plain and clear as that usually employed by Congress to exclude the State's authority in legislation on the same or similar subjects.

Congress has used language to exclude State authority both prior to and subsequent to the passage of the statute under discussion. When the country was involved in war and it became necessary that a central power should take charge of and control the commerce of the country without interference and when time was the essence of its power, when it became necessary that the State should surrender every right which it had to the central government, the act was passed giving to the President such power. Small limitations were placed upon his authority, but Congress, composed of the representatives elected from the several States, was careful to preserve as far as possible the police powers of the States, and after making the provisions referred to, inserted a section reading as follows:

"Section 15. That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulation of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war material, government supplies or the issuing of stocks and bonds." (Federal Control Act.)

The intention of Congress in the foregoing cannot be mistaken. The time had not arrived when Congress was willing, even in so great an emergency as the act required, to strip the States of their rights and police powers nor to infringe upon them except for the purposes stated, which were declared to be necessary during the emergency.

The emergency passed and Congress quickly returned to the carriers their property. We have referred to its interest in rehabilitation by the carriers of their property to the end that the commerce of the country be not crippled at an important period in its commercial history.

As a further aid to the carrier and to insure the rehabilitation of their property, and for the further purpose of securing the gov-

ernment in any indebtedness by the several carriers to the government, an act was passed providing for the issuance of securities to extend over a period not exceeding ten years for the purpose of refunding the carriers' indebtedness to the United States. This is expressed in Section 207 of the Transportation Act. It was necessary that such indebtedness be refunded regardless of the requirements of any State. The indebtedness had been made. They had been made during an emergency when a State could afford to forego its rights and suspend its police powers for the common good. That the government may be able to lend a further helping hand and the commerce of the country properly protected, it was necessary that security be given for such indebtedness and the power of the State to prevent it was excluded. The language used by Congress for this purpose cannot be mistaken. We copy the language as follows:

"(g) A carrier may issue evidences of indebtedness, pursuant to this section, without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification."

Further providing for the carriers in this respect, Congress created a revolving fund to be used in making new loans to railroads. Such new loans may be necessary in order to provide equipment, betterments and extensions to meet the conditions arising with the close of the war and in order to conserve the interest of the general public. An emergency is here seen as in the foregoing, and Congress again uses language similar to that quoted above and which cannot be mistaken. We quote from Section 210:

"(f) A carrier may issue evidences of indebtedness to the United States pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification."

If, during the great emergency existing, which called for the operation of the railroads of the country by the central government to the exclusion of the owners, Congress saw fit to preserve

the police powers of the State, so far as was possible for the period of this emergency when it may be presumed that all the State's authority has been superseded, and if after its return, the acts were passed as referred to, which necessitated the power of the State, with reference to the issuance of securities, be superseded, Congress deemed it necessary in order that the authority of the State be excluded to say so in plain and unmistakable language, should, then, this court feel called upon to construe the language as contended by appellees with reference to abandonments by carriers of the lines so as to exclude the authorities, the police powers of the State, when such exclusions are not necessary to meet the ends in view in passing the enactment, particularly in view of the distinctions made by the wording of the act between the powers of the Commission to order abandonment and its power to compel extensions? *

We submit in the light of reasons given and the language quoted that Congress did not intend by the act, and that it does not exclude the authority of the State, but that the full purpose is served and the language of the law has been complied with when the Interstate Commerce Commission gives to the carrier its authority to abandon the operation of its line as an interstate carrier, leaving it then to be dealt with by the State creating its corporation and to which it owes its existence and with which it has a charter contract and obligation.

It makes no difference what the form of the order may be if authority is given to the carrier to abandon its roads contrary to the laws of the State of Texas. If the order is affirmative, injury is done to the State of Texas and to the parties complaining herein, there is equity in the bill and the court erred in dismissing it. The only theory upon which a court could grant the motion was that stated by it, that the act is constitutional and the further conclusion must be reached, even though not stated by them in an opinion that they had the act to give no authority to the carrier to abandon its operation, but was merely permissive so far as interstate commerce may be affected.

Attention is called to the further fact that the Eastern Texas

Railroad Company is a party defendant and that it filed no motion to dismiss as to it. The court's attention is further called to the record for the fact that this is an application for an interlocutory injunction, the court being called in vacation by the terms of the act and it is without authority to dismiss the bill or to do anything further than to grant or refuse the interlocutory injunction. Certainly it could not, under the motions filed, dismiss the bill as to the Eastern Texas Railroad Company, a party defendant.

Inasmuch as attorneys representing the St. Louis Southwestern Railway Company of Texas and the St. Louis Southwestern Railway Company appeared in behalf of a motion to dismiss the bill and concurred in the argument presented by the Assistant Attorney General of the United States and counsel representing the Interstate Commerce Commission, we are presuming that this court will follow the interpretation given the act and the meaning and extent claimed by them for the order which this bill seeks to set aside. Under this interpretation we will proceed.

THE BILL COMPLAINING OF THE DEFENDANT CARRIERS SHOULD BE REINSTATED AND THE COURT BELOW DIRECTED TO ISSUE AN INJUNCTION.

If the order is only permissive and not directory, the carrier must comply with the lawful requirements of the State of Texas. The laws of the State prohibiting abandonment of railroads would then, in no sense, be an embarrassment to interstate commerce or the lawful orders of the Interstate Commerce Commission. In this position, the State of Texas is consistent. We quote the following from the brief heretofore referred to in the case of the State of Texas, Appellant, vs. Eastern Texas Railroad Company, Appellee, No. 298, October term, 1921, being from pages 22 to 30 of said brief:

The lawful powers of a State may control the physical properties of its private corporations and make rules and regulations therefor in accordance with the terms of its charter contract, with its amendments, and the laws of the State which enter into and become a part of such charter contract so long as such action

does not become a direct burden on interstate commerce and so long as the exerting of power over its corporations does not prevent or embarrass exercise by Congress of any power with which it is vested by the Constitution. (B. & O. Ry. vs. Maryland, 21 Wallace, 156-173; Northern Securities Co. vs. United States, 193 U. S., 317.)

The Eastern Texas Railroad Company has a charter contract with the State of Texas by which it agreed to operate its line of railroad for a period of twenty-five years, beginning November 1, 1900. The road is situated wholly within the State of Texas and its charter authorized it to do business as a common carrier within the State of Texas and further authorized it to receive freight and passengers from connecting lines without designating whether such freight and passengers should be interstate freight and passengers or not. The charter also adopted all laws that may be passed by the Legislature of the State of Texas in regulating common carriers doing business wholly within the State, and by the terms of such laws they became a part of its charter contract.

At an early day, and before the building of steam railroads, Chief Justice Marshall wrote the opinion in *Gibbons vs. Ogden*. He recognized then the rights of the State to regulate its internal commerce and this recognition was expressed and repeated in words directly to that effect. This court has ever followed this opinion. So far as we know, no part of it has ever been set aside. It is quoted by appellee with approval. We call attention to the fact that in this opinion the court recognized the right of the State to control the physical properties of carriers within its bounds though they have engaged in interstate commerce. On page 263, in summarizing a mass of legislation not surrendered to a general government, and which it was observed could be most advantageously exercised by the State itself, the Chief Justice included among them "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State and those with respect to turnpike roads, ferries, etc." What was the relation, at that time, of turn-

pike roads and ferries to interstate commerce? They are practically extinct at the present day and time and have been superseded by railroads and railroad bridges. No more are the physical properties of the railroad today the instruments of commerce than were turnpike roads and ferries at the time Justice Marshall wrote this opinion. On page 206, asserting the supremacy of Congress to legislate, he limits it "so far as may be necessary to control" State laws, "for the regulation of commerce." On page 208, however, he acknowledges the power of a State to regulate its police, its domestic trade and to govern its own citizens, including of necessity the corporations created by it, which power to regulate gives to the State the power to legislate to a "considerable extent." If to the State is reserved the power to regulate, it must then follow that Congress does not have the power with respect to the same subject to annihilate or exterminate.

It is not the contention of the State of Texas that it can enforce the provisions of this contract when same embarrasses the Federal government in the enforcement of any of its laws passed in accordance with its Constitution and particularly laws in regulation of interstate commerce. It is the position of the State, however, that when the Federal government, acting through Congress or its committee or commission, designated the Interstate Commerce Commission, withdraws the patronage of interstate commerce from the Eastern Texas Railroad, it has reached the limit of its authority. The road ceases to be engaged in interstate commerce and its physical properties are of a nature that it is henceforth beyond the power of Congress to exercise any influence over it. Congress has no power of extermination. There is no harm in the physical property itself that gives to Congress the power to exterminate it when it has been released from its obligations to the Federal government by the withdrawal from it its privilege of carrying the mail, and receiving interstate passengers and freight. Corporate obligations are in no manner affected, and it must then apply to the State which created it, who alone can give authority for its abandonment.

It is within the conception of practical business men that the

carrier, though withdrawing from interstate commerce, may yet serve a useful purpose to its State and comply with the obligations which it assumed to the State creating it. It must, therefore, be a matter of judicial ascertainment before there is an authority who can say the contractual obligations to its State have been performed and such judicial ascertainment must be founded upon the facts properly pleaded before a court of competent jurisdiction created either by the State or by Congress in accordance with its power under the Constitution to create courts.

This court has frequently held and particularly in *Louisville & Nashville Railway Co. vs. Kentucky*, 161 U. S., 677, 702, that it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce so far as the legislation was within its ordinary police power. This case recognized that to the States belong the power to create and to regulate the instruments of such commerce as far as necessary to the conservation of the public interest. It quotes with approval former holdings of the court to the effect that Congress could not limit the power of the States to create corporations, define their purposes, fix the amount of their capital and determine who may buy, own and sell their stock. (Quoted with approval in *Northern Securities Co. vs. United States*, *supra*.)

Would any force be added to this if the court had said that the States have power to fix the time in which the corporations which they create shall live? Is it not true that the Federal government in the exercise of authority whereby the corporation is destroyed would take from the State, in the self-same act, all the authority conceded to it under its police power to create, fix the purpose, amount of capital and determine who may buy, own and sell the stock of its corporations? Could it not, in the next instant, after the creation by the State of a corporation defeat its action by ordering its destruction and would not such destruction effectively deny to the State all of its other powers of regulation?

That the State has a commerce purely internal, not mixed with interstate commerce and having such limited influence over inter-

state commerce as to relieve it from the regulation of the Federal government, has been continually recognized by Congress and by all the courts. From the court's opinion in *Northern Securities Co. vs. United States*, *supra* (page 349) we quote this language:

"The regulation or control of purely domestic commerce is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the general government, or any legal enactment of Congress."

Is it conceivable that the State, having a commerce over which it exercises exclusive control, cannot control a corporation engaged in such commerce? Would it not be as reasonable to say that Congress can exclusively regulate the commerce of a nation without any power to regulate the instruments of such commerce, and is it not by the same process of reasoning that Congress is given any power whatever to regulate or control, in any manner, the instruments of interstate commerce? The reasoning applying to one applies also to the other, and it would be fallacious to conclude that the time has arrived, or will arrive, when the State has no commerce except that which is commingled with and becomes a part of interstate commerce; that though it can regulate its intrastate commerce, and though it may create the corporations which are to carry it on and give such corporations life, it cannot determine the number of their years. That its creatures whose purpose is determined by it and whose contracts are recorded in its archives, can, in the exercise of a privilege which it gives also in interstate commerce, abstract from the State all power which it had under it and defeat the State in all of its rights, under the Constitution of the State, under its laws and under the terms of its charter, while the carrier at the same time claims the privileges and immunities which its creator gives. For is it not a proper conclusion that in the event the Federal government directs the abandonment by the carrier of its property, directs its sale and disposition, that it thereby withdraws it from every vestige of power which the State has over it under its police power or authority? The State, in such event, must stand by with folded arms, stripped

of every power which the Constitution of the United States guarantees to it and which it has heretofore exercised without dispute from any source and see the creature of its creation exterminated. It is not conceivable that the constitutional provision granting to Congress the power to regulate commerce gives to it such power superior to the guarantee which that same Constitution directly gives to the States ratifying it, and that, through any broadening of the powers under such condition, through judicial interpretation, should the Congress be permitted to annihilate the privileges guaranteed to a State, in the pretense of exercising remotely its authority to regulate commerce. We repeat that there is no contention upon the part of the State of Texas that it has power to endow its corporations with authority to restrain interstate commerce or international commerce to disobey the national will as manifested in legal enactments of Congress, but with this same thought we reassert under a full assurance from the decisions of the courts that when the Interstate Commerce Commission gave the Eastern Texas Railroad Company its authority to abandon its engagement in interstate commerce, it reached the full power of Congress under the Constitution and the right of the State of Texas to compel the continuance by the defendant, appellee here, of its engagement in intrastate commerce in no manner embarrasses the Congress in the exercise of its legal rights and no further affects interstate commerce than does each and every individual occupation or profession which produces goods for shipment or demands in any way or furnishes patronage to interstate commerce. It can do no more than produce, at the point of contact with interstate carriers, freight and passengers which may be delivered to them for transportation and which they, under the rules and regulation of the Interstate Commerce Commission may or may not receive. Does not the farmer who raises his products in this vicinity and hauls them to market do as much? To be mentioned also are the manufacturing plants, including saw mills, brick kilns, foundries and other industries at the particular point in question as well as mines and quarries, each producing articles for transportation to be received under the rules and regulations of the

Interstate Commerce Commission, because their products are to be transported, and can it be said that they and each of them so affect interstate commerce and, regardless of their nature, they may be regulated or exterminated at the will of Congress or of the Interstate Commerce Commission when so directed by Congress?

Quoting again from the decisions of this court, in *Atlantic Coast Line Co. vs. North Carolina Corporation*, 206 U. S., 1, it was said in the opinion:

"The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject as to their State business to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Chief Justice White quoted this with approval in *M. P. R. R. Co. vs. Kansas*, 216 U. S., 262, and commenting thereon held that acts of the State in compelling the running of a train within the State by a railroad engaged in interstate commerce, incorporated by another State, that unless for some reason the order must be treated as such an arbitrary and unreasonable exercise as to cause it to be in effect not a regulation but an infringement on the right of ownership or circumstances considered as operating a direct burden upon interstate commerce, the State's order must be complied with, thus holding the action of the State within its police power. Conceive, if you can, the right of a State to force the running of trains by a road within its territory which is incorporated under the laws of another State and, at the same time, this State would be denied the right to enforce the contractual obligation of such carrier to operate trains at all. When we have reconciled this thought with proper reasoning based upon such decisions of our courts, then we may properly concede that Congress has the power claimed by it and exercised by the Interstate Commerce Commission in authorizing and directing the abandonment by the defend-

ant of its operation and the sale and alienation by it of all of its physical properties within the State of Texas.

In the case at bar, we are not left to indulge in uncertain implications for the reason that appellant is protected in all of its contentions by a charter contract whose words are definite, the purport of which appellee makes no effort to deny. There is read into this charter a previously adopted constitution and under it previously enacted statutes.

The contract guarantees the operation of trains on appellee's line of railroad for a period of twenty-five years. That time has not expired. The constitutional statutes referred to forbid the abandonment of operation by all common carriers without the consent of the State of Texas, regardless of whether this period of time has expired or not. The enforcement of this contract by appellant does not preclude the Interstate Commerce Commission from withdrawing from appellee all patronage of interstate commerce and, therefore, imposes no burden upon interstate commerce. We therefore insist that the power to order the abandonment by appellee of its line of railroad does not lie with Congress nor with the Interstate Commerce Commission.

If the State of Texas has the power to control the physical properties of its corporations and compel the operation by carriers engaged in intrastate commerce when same does not embarrass interstate commerce or the lawful orders of the Interstate Commerce Commission or the constitutional acts of Congress, then it is certain that in this case, the State's remedy in equity is sufficient to restrain the alleged action of the defendant carriers and the bill should be reinstated and the court directed to hear it on its merits with the proper instruction as to the interpretation which the Supreme Court gives of Sections (18) to (21) of the Transportation Act under which authority the order was issued and the court below should be instructed to uphold the laws of the State of Texas relative to abandonment by carriers of their line of railroad and injunctions sought as against the carriers should be ordered.

CONCLUSION.

In this brief, we have eliminated all discussion as to the constitutionality of the act. Believing as we do that the interpretation given the act does not supersede any authority of the State, so far as abandonments are concerned, and concurring in that view taken by appellees before the trial court, we ask that this court so interpret the act and that an opinion be rendered to that effect and proper order for the disposition of the suit be made.

C. M. CURETON,

Attorney General,

WALACE HAWKINS,

TOM L. BEAUCHAMP,

Assistant Attorneys General,

Solicitors for Appellants.

Austin, Texas, October 3, 1921.

NOV 18 1921
W. A. SWANSON

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 563

THE STATE OF TEXAS AND C. M. CURETON, PER-
SONALLY AND AS ATTORNEY GENERAL FOR
THE STATE OF TEXAS, APPELLANTS.

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, H. M. DAUGHERTY, AT-
TORNEY GENERAL OF THE UNITED STATES,
EASTERN TEXAS RAILROAD COMPANY, ST.
LOUIS SOUTHWESTERN RAILWAY COMPANY,
AND ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY OF TEXAS, APPELLEES.

BRIEF OF APPELLEES,
EASTERN TEXAS RAILROAD COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
OF TEXAS.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,

Solicitors for Appellees, St. Louis Southwestern
Railway Company; St. Louis Southwestern
Railway Company of Texas; and Eastern Texas
Railroad Company.

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISION, H. M. DAUGHERTY, ATTORNEY GENERAL OF THE UNITED STATES, EASTERN TEXAS RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, APPELLEES.

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BRIEF OF APPELLEES,
EASTERN TEXAS RAILROAD COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
OF TEXAS.

STATEMENT OF THE CASE

The statement of the case as made by appellant is accepted as far as it goes; and the following additions are made thereto:

The State sues as a sovereign State and alleges no facts other than general statements as to the territory where the lines of railway of the Eastern Texas Railroad Company are

situated, the population, production, business and industries of that territory, and general statements and predictions as to the effect the abandonment of the railroad would have upon the people in the territory and their commerce and industries. To these are added predictions as to the probable future of the development of the territory.

Then the State pleads a synopsis of the provisions of the Constitution and Statutes of the State applicable to creation, control and regulation of railroad transportation and the conduct of railroad companies.

C. M. Cureton, Attorney General of the State, joins with the State in the suit, but no allegations are made with reference to him except his authority as Attorney General, and we conclude that he suea in his official capacity only.

Following these allegations, appellants allege (Petition paragraph XXVI; Tr. pp. 17-18) that Section 402 of the Transportation Act of 1920, particularly subdivisions 18, 19, 20, 21 and 22 of said Section, violates the Constitution of the United States. These objections and paragraphs setting forth the reasons of appellants as to why the same are unconstitutional assign numerous reasons therefor. (Tr. pp. 19-20).

It will be observed that this summary of reasons why the paragraphs of the Transportation Act referred to are unconstitutional, raise the question of the reserve powers of the State; power conferred upon Congress to regulate commerce; prohibition of suits against the State; infringement upon the authority of the Judicial branch of the Government; and violation of the Fifth Amendment, which prohibits the

taking of property without due process of law.

Appelants then, in the XXIII paragraph of their petition (Tr. p. 24) allege that unless restrained, the Eastern Texas Railroad Company will abandon its line of railway and dismantle the same under the authority of the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commision on December 2, 1920. This Certificate, together with report of the Commision upon which the Certificate is based, is attached as "Exhibit 'A'" to the petition and made a part thereof (Tr. pp. 27-32 inclusive). The report of the Commision contained in said Exhibit (beginning at page 27 and ending on page 31) sets forth the facts found by the Commision on a hearing of the Application filed by the Eastern Texas Railroad Company with the Commision on June 3, 1920. These findings of fact are full and complete.

Among the material facts are: (a) That the Company was promoted and financed by individuals interested in the Texas Louisiana Lumber Company (Tr. p. 28); (b) The line was constructed primarily to serve the Lumber Company which then owned 116,000 acres of pine timber land near Kennard, and the Lumber Company constructed at Ratliff near the terminus of the line, one of the largest mills in the South, for the production of lumber and forest products (Tr. p. 28); (c) The Texas Legislature had refused to authorize a consolidation with the St. Louis Southwestern Railway Company of Texas unless the Eastern Texas Railroad Company would extend its line to Crockett; (d) That the mill ceased operation about 1917, and that all of its tram tracks,

buildings, machinery, etc., have been removed to locations not on the lines of the Eastern Texas Railroad Company (Tr. p. 28); (e) That after the mill ceased operation, the traffic was not sufficient to pay the operating expenses and maintain the line of railway (Tr. pp. 28-29); (f) The Eastern Texas Railroad Company lines connected at Lufkin with the St. Louis Southwestern Railway Company of Texas and other lines, and extended to Kennard where it had no railroad connection; (g) the situation of the territory served, after the line would be abandoned, is set forth (Tr. pp. 30-31); and upon the facts found the Commission concluded that the present public convenience and necessity permitted the abandonment of the line (Tr. p. 31).

Thereupon, the certificate of Public Convenience and Necessity issued, and it shows that paragraphs 18 to 21 inclusive of Section 1 of the Interstate Commerce Act had been complied with (Tr. pp. 31-32), and authorizes the abandonment of the operation of the railway owned by the Eastern Texas Railroad Company, and the taking up, dismantling and removal of any and all parts of its property (Tr. p. 32).

Exhibit "B" made a part of the Petition (Tr. p. 33) contains the Articles of Incorporation of the Eastern Texas Railroad Company.

The final order made in the court below sustained the motion of the United States and the motion of the Interstate Commerce Commission to dismiss the bill (Tr. pp. 50-51), from which order appellants, in open court, appealed, and the appeal was annulled (Tr. pp. 50-51).

This Court has heretofore ordered that this cause be sub-

mitted and argued with the case of State of Texas, appellant, vs. Eastern Texas Railroad Company, et al, Appellees, Number 298, October term 1921 (870); which latter case had been fully briefed prior to the making of the order for submission of the two causes together. We deem it unnecessary to encumber this brief with a repetition of the arguments contained in the brief in cause 298, and instead of doing so, cite that brief and rely upon the same as fully as if reproduced herein.

SOVEREIGNTY, STATE AND FEDERAL

Appellants in the case at bar base their cause of action upon the unconstitutionality of Paragraphs 18, 19, 20, 21 and 22 added to the First Section of the Act to Regulate Commerce, by the provisions of Section 402 of the Transportation Act. These paragraphs have been copied in full at pages 25-27 of our Brief in Cause No. 298, and are not repeated herein.

Digesting the contention of appellants, made in their petition, their assignments of error, and their brief in this cause, we find that their primary contention is that in the distribution of sovereign powers to regulate commerce between the State and the United States, power was not conferred upon the United States to authorize the abandonment of a line of railway which had been constructed under a charter granted by the State, and which line of railway was situated wholly within the State. The trial court by dismissing their petition decided this contention against them.

We submit that in order for this court to reverse the trial court on this point, it must hold, either:

1. That the sovereign power had not been delegated by the people in the Constitution to the Congress to legislate upon the subject; or
2. That the power exercised by Congress in the paragraphs of the Transportation Act referred to violates some provision of the Constitution of the United States.

The position of appellants is set forth in their brief, beginning at page 6. After some general discussion of the question bringing it down to the fact that a carrier which could not earn operating expenses would be a burden upon interstate commerce, appellants referring to said paragraphs say: "It was, therefore, provided that such carrier may be relieved, either upon their own application, or upon the Commission's initiative from engaging in interstate commerce. *** To this theory and thus far, we subscribe. We assert, however, that when Congress had withdrawn interstate commerce from such carriers by giving permission for their abandonment, the full purpose of the act has been accomplished, and no further action was authorized."

Then appellants discuss the provisions of the paragraphs referred to, and after giving their construction of these paragraphs, at page 10 state their conclusion as to the limitation that must be placed upon the action of Congress, as follows:

"We submit in the light of the reasons given, and the language quoted that Congress did not intend by the Act, and that it does not exclude the authority of the State, but that the full purpose is served

when the language of the law has been complied with, when the Interstate Commerce Commission gives to the carrier its authority to abandon the operation of its line as an interstate carrier, leaving it then to be dealt with by the State creating its corporation, and to which it owes its existence, and with which it has a charter contract and obligation."

It will be observed from these quotations, and from the entire presentation of the question in appellants' brief, that they concede in this court that Congress has the power to legislate upon the subject of the abandonment of a line of railway, and has the authority to grant permission to abandon the use of a railroad in interstate commerce, but they contend that Congress has not the power to authorize the abandonment and dismantling of a line of railway.

We submit that the limitation upon the power of Congress, where its authority to legislate upon the subject is admitted, cannot be sustained. The decisions of this court are uniformly against this contention. The rule as we understand it is:

The power conferred upon Congress by the Constitution over commerce among the states and with foreign nations is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitation save such as are prescribed in the Constitution, whenever such legislation bears, or in the exercise of fair legislative discretion can be deemed

to bear, upon the reliability or promptness or economy or security or utility of interstate commerce.

The foregoing proposition is fully sustained by the decision of this court in the case of *Mondou vs. N. Y. N. H. & H. R. Co.*, 223 U. S. page 1, 56 L. ed. 327, in which case this court at page 746, L. ed. 344, announces the construction of Article 1, paragraph 8, clauses 3 and 18 of the Constitution, that are settled and no longer open to dispute. (See quotation from opinion of this court in Appellees' brief in cause 298, page 19 and 20).

See also *McCullough vs. Maryland*, 4 Wheaton 316, 4 L. ed. 579.

H. E. & W. T. Ry. et al vs. U. S. 234 U. S. 342, 58 L. ed. 1341.

We also make an extended quotation on this subject from the latter case in our brief in cause No. 298, beginning at page 21, and as part of our argument, we beg leave to extract from that quotation the following:

"The fact that carriers are instruments of intra-state commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care."

These authorities show beyond question that the limitation upon the power of Congress suggested by Appellants cannot be sustained. We, therefore, proceed to the consideration of the question as to whether or not the para-

graphs of the Transportation Act referred to violate some other provision of the Constitution of the United States.

RIGHTS OF A STATE UNDER THE CONSTITUTION OF THE UNITED STATES.

Appellant, the State of Texas, being joined therein by its attorney general, brings this action as a sovereign state, and claims that the rights reserved to the state by the Constitution of the United States have been violated by the paragraphs of the Transportation Act under consideration, in the following particulars:

1. Appellants assert that the Eastern Texas Railroad Company was incorporated under and by virtue of the Constitution and laws of the State, whereby the Constitution and laws of the State became a part of the charter contract between the railway company and the state, and that said paragraphs of the Transportation Act authorize the Railway Company to abandon the operation of its railway and take up its main track in violation of the provisions of said charter contract.

Now, we concede that in a sense the Constitution and laws of the State of Texas became a part of the charter contract between the railway company and the state, but we assert that the Constitution and laws of the United States became, in a sense, a part of such charter contract.

And when Congress, in the exercise of the power conferred upon it, proceeded to legislate upon the subject of the abandonment of railroads, and enacted the paragraphs referred to in the Transportation Act, then such paragraphs

superceded the provisions of the Constitution and laws of the State. This point is sustained by the opinion of this court in the case of Baltimore & Ohio Ry. Co. vs. I. C. C. 221, U. S. page 612, 55 L. ed. 878, in which case at page 618, L. ed. 882, this court in considering the argument that the Hours of Service Law passed by Congress did not apply to employees engaged in intrastate commerce, said:

"But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.

"This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them."

This was a correct announcement of the authority of Congress as to employes who necessarily engaged in both interstate and intrastate commerce.

And we submit that the necessity for the intermingling of intrastate commerce and interstate commerce by a carrier engaged in the transportation of both is greater than it is

with reference to the employees. Interstate commerce and intrastate commerce are frequently and commonly carried in the same car or in the same train and between the same points, and often for the same shipper, over the same line of railway. It would be impossible for Congress to properly exercise its power to regulate interstate commerce so as to determine when a line of railway should be extended or abandoned, without incidentally affecting intrastate commerce. We insist, therefore that the conclusions reached in the B. & O. case apply to the case at bar.

That case was referred to and approved by this court in the case of Houston East and West Texas Railway et al, vs. U. S., 234, 342, 58 L. ed. 1341, from which we have made an extended quotation in appellees' Brief at page 21 in cause No. 298, and we quote therefrom the following paragraph on page 233:

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the State, and not the Nation, would be supreme within the national field."

In the Transportation Act, Congress was legislating with reference to the "National field" of commerce, a domain into which the State cannot enter. The cases sustaining this proposition are too numerous to quote.

2. Appellants assert in their brief that:

"The lawful powers of a State may control the

physical properties of its private corporations and make rules and regulations therefor in accordance with the terms of its charter contract, with its amendments, and the laws of the State which enter into and become a part of such contract so long as such action does not become a direct burden on interstate commerce and so long as the exerting of power over its corporations does not prevent or embarrass exercise by Congress of any power with which it is vested by the Constitution." (Pages 11 and 12 Appellants' Brief).

Upon this right of the State, Appellants cite: *B. & O. Ry. Co. vs. Maryland*, 21 Wallace 456-473; *Northern Securities Co. vs. U. S.* 193 U. S. 197, 48 L. ed. 679.

It will be remembered that the latter case was an action brought by the United States against the Northern Securities Company, charging a violation of the Anti-Trust laws passed by Congress. It was alleged that a combination had been made of the stock of the two corporations by the purchase of such stock by the Securities Company, which Company was a state corporation. The argument was made that the State had authorized the Securities Company to acquire the stock, and that the enforcement of the Anti-trust Act passed by Congress against the Securities Company, whereby it would be prohibited from acquiring such stock would be an unauthorized interference by the national government with the internal commerce of the states. This court in disposing of that argument, at page 332, L. ed. 698, made the following announcement of the law:

"An act of Congress constitutionally passed un-

der its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. *Cohen vs. Virginia*, 6 Wheat 264, 385, 414, 5 L. ed. 257, 286, 293. These views have been often expressed by this court."

Then this court in the same opinion, took up and considered a number of questions presented by the Appellant Securities Company, with reference to minor details, about the creation of corporations, the regulation of corporations and the control of the property of corporations by the State and under its authority. This court announced that no contention was made by the Appellee with reference to these matters, and then at page 335, L. ed. 699, said:

"But it (the United States) does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed."

After further discussing the question the court referred to the opinion of Chief Justice Marshall in the case of *Gibbons vs. Ogden*, 9 Wheaton page 196-197, 6 L. ed. 23-70,

and cited the same in support of the conclusion reached. The portions of the opinion in Gibbons vs. Ogden referred to, are quoted in Appellees' Brief in cause No. 298, pages 11-12 inclusive.

We, therefore, submit that the Northern Securities case is not authority for Appellants, but on the contrary decides the contention made by Appellants against them.

In the case of Smith vs. Alabama, 124 U. S. 465, 31 L. ed. 508, this Court had under consideration a case where an engineer who had operated an engine, pulling a passenger train upon the Mobile & Ohio Railway, used in transporting passengers in the County of Mobile and the State of Alabama, had been arrested for violating the law of Alabama providing that engineers should be examined for a license by a Board appointed by the Governor. Pending his arrest, the engineer applied for a writ of habeas corpus. The City Court, a municipality, refused to discharge the engineer, and the Supreme Court of the State of Alabama affirmed the judgment of the lower court. The case was then brought to this court. The facts showed that the engineer's run was from Mobile, Alabama, to Corinth, Mississippi, and that he had not stood the examination and procured the license required by the Statutes of Alabama. In passing upon the case, this court passed directly on the question of the power to regulate commerce reserved to the state, and in doing so, in the beginning of the opinion, at page 473, L. ed. 510, used the following language:

"The grant of power to Congress in the Constitution to regulate commerce with foreign Nations

and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States."

The Statement of the law contained in the forgoing quotation was approved in the case of *Mondou vs. N. Y. N. H. & H. R. Co.* 223 U. S. 426, 56 L. ed. 348. After making the quotation in the *Mondou* case, this court added:

"True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because

the subject is one which falls within the police power of the states in the absence of action by Congress. * * And now that Congress has acted, the laws of the states, in so far as they cover the same field are superseded, for necessarily that which is not supreme must yield to that which is."

Supporting which a large number of authorities are cited.

The two last cases cited, and the authorities referred to in those cases, show conclusively that although there was reserved to the states, and the police powers of the States, the right to prohibit a Railway Company from abandoning its main line of railway, and the State acting on this reserve power, had done this, still, when Congress acted within its constitutional power and authorized the abandonment, then the laws of the state were annulled.

AUTHORIZING THE ABANDONMENT OF A RAILWAY LINE IS A LEGISLATIVE ACT.

Under our form of government the distribution of the exercise of sovereign powers is fixed by constitutional provisions, both state and federal.

Under this distribution of powers, the Congress is authorized to create corporations.

McCullough vs. Maryland, 4 Wheaton, 316; 4 L. ed. 579.

Under the provisions of the Constitution and laws set forth in Appellants' petition, and relied upon in their brief, the Legislature of the State of Texas is authorized to create

and regulate private corporations, including railroad corporations, and has power to authorize the abandonment of lines of railway by a railway corporation.

The Thirty-Sixth Legislature of the State of Texas convened January 12, 1919 and passed the following Act:

"S. B. No. 293, Chapter 56.

An act to permit Texas Southwestern Railroad Company to take up and remove that portion of its railroad lying between Vair and Neff, and to sell and dispose of that part of its Right-of-way included between said two stations and to abandon the same and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That permission is hereby granted Texas Southeastern Railroad Company, its successors and assigns, to take up and remove that portion of its line of railroad, including all rails, ties, angle bars, track fastenings, switches, sidings, signs, turnouts, wyes, depots and all other material and equipment belonging to said Company, including the line of railroad from the station of Vair, where the said Texas Southeastern Railroad Company connects with the line of road of the Groveton, Lufkin and Northern Rilway Company to the Northern Terminus of said line at Neff, a distance of approximately 7.7 miles, and to sell or dispose of all said material, including that portion of said Company's lands, in such manner as it may see fit, and to abandon all of that portion of its track and line of railroad. Provided, however, that the authority herein granted shall be subject to any and all valid liens existing upon or against said property and subordinate to the right of all holders of such liens, if any.

Section 2. The fact that said Texas Southeastern Railroad Company has never been able to pay its operating expenses upon that portion of said line, and the fact that a line of railroad between Vair and Neff is not required to serve the public interest, and the further fact that its track and equipment is rapidly deteriorating and will soon become a total loss to its owners, creates an emergency and an imperative public necessity which requires that the constitutional rule providing that bills be read on three several days be suspended, and this act shall take effect and be in force from and after its passage, and said rule is hereby suspended, and this act shall take effect and be in force from and after its passage, and said rule is hereby suspended, and it is so enacted.

Approved March 13, 1919.
General Laws of Texas, 36th Legislature, page 96"

At the same session a similiar Act was passed authorizing the Artesian Belt Railroad to take up its track (page 115). Also an Act authorizing the Texas Arkansas & Louisiana Railway to take up its tracks (Page 130). And at the same session The Riveria Beach & Western Railway were authorized to take up its tracks (page 39-40). These three last named Acts are in substance the same as the one quoted, and in each of them the Legislature finds practically the same facts as are found by the Interstate Commerce Commission in granting the certificate of Public Convenience and Necessity to the Eastern Texas Railroad Company.

It will be admitted that the Congress with reference to any railroad corporation created by it, could exercise the same power and authorize the abandonment of the

property of such corporation in the same manner as the Legislature of the State of Texas. It will also be admitted that Congress with reference to such corporation could have exercised such power in the manner prescribed in Paragraphs 18, 19, 20 and 21 of Section 402 of the Transportation Act.

Appellants contend, however, that Congress could not exercise such power with reference to a railway corporation created by the State of Texas without the permission of the State being procured by the railway company. There might be some plausibility in this contention if it were not for the facts stated in Appellant's petition, wherein they rely upon Articles 6608-6617 of the Revised Statutes of Texas, the first of which was formerly Article 4535 (Tr. p. 15).

By the provisions of this latter article railway corporations created by the State were required to engage in interstate commerce. It cannot be questioned, it seems to us, that where the State requires a railway corporation created by the State to engage in interstate commerce, and it does so engage, that then its lines of railway become an instrument of interstate commerce subject to be regulated by Congress. This is manifest by the provisions of the Act to Regulate Commerce, which Act applies to carriers engaged in interstate and foreign commerce; and which Act by virtue of the amendment of the first section thereof, contained in Sections 402 of the Transportation Act, whereby Paragraphs 18, 19, 20 and 21 were added to said Section 1, now authorizes the abandonment of a line of railway in the

manner and form provided in said paragraphs. These paragraphs apply to a railway company and its lines of railway regardless of whether or not the Railway Company was created by the State or by the United States. The power by Congress is not affected by the question as to what government created the corporation; but depends upon the fact that the Railway Company is engaged in interstate and foreign commerce.

However, the record in this cause presents a conflict between the regulations prescribed by the state and the regulations prescribed by Congress.

It is alleged in Appellant's petition that the State had prohibited the abandonment and dismantling of a main line of railway, and we admit the correctness of this allegation. On the other hand, the Congress, by the provisions of paragraphs 18, 19, 20 and 21 of Section 402 of the Transportation Act, authorized the abandonment of a line of railway by a carrier that had procured a certificate of public convenience and necessity from the Interstate Commerce Commission.

We submit that under the Constitution of the United States, and laws passed in pursuance thereof, and the authorities cited in this brief and in our brief in case number 298, the regulations prescribed by the state must yield to the regulations prescribed by Congress.

Appellants admit that Congress could authorize the Eastern Texas Railroad Company to abandon the use of its property in the transportation of interstate and foreign commerce, but deny the power of Congress to authorize the

abandonment by said railway of such property in the transportation of intrastate commerce.

And appellants claim that said provisions of the Transportation Act should be so construed by this court. They base this contention largely on the words: "From and after the issuance of said Certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate, and proceed with the construction, operation or abandonment covered thereby", contained in paragraph 20 of Section 402, asserting that these words simply mean that no other federal approval should be required. In support of this contention they quote other provisions of the Transportation Act.

On the other hand, we submit that the language of the Transportation Act will not support the contention made by Appellants. Immediately following the language quoted is a provision making it unlawful for a carrier either to extend, or abandon its lines in violation of the provisions contained in these paragraphs, which provisions subject not only the carrier but each of its officers and agents acting for or employed by such carrier to a fine of not more than \$5000.00 or imprisonment for not more than three years, or both.

This penalty enactment is followed by paragraph 21, which required the furnishing of adequate facilities in the way of car service, and makes it a penalty to disobey such requirements.

Then making the matter more definite, Section 22 is

added, wherein it is provided "That the authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, switching or sidetracks located or to be located wholly within one state, or of street, interurban or interurban electric railways, which are not operated as a part, or parts, of a general steam railroad system of transportation."

This section 22 makes it clear that Congress was legislating fully, completely and finally with reference to general steam railroad systems of transportation, but that Congress did not intend such regulations to extend to such minor details as sidetracks, street railways, etc.

ACT TO REGULATE COMMERCE.

Going beyond the construction of paragraphs 18, 19, 20 and 21 of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act, and looking to the entire system of regulation as now prescribed by Congress, it is, as we conclude, entirely clear that Congress intended to authorize the abandonment of a railway without the consent of the State being obtained.

The Act to Regulate Commerce, as originally passed in 1887, was limited in its scope. From time to time Congress has adopted amendments extending the scope of this Act. The authority of the Interstate Commerce Commission, for instance, over rates, was very limited in the original Act. This authority has now been extended until the Interstate Commerce Commission is in effect a rate-making body. The authority of the Commission in many other respects has been extended.

In an Act supplemental to the Act to Regulate Commerce, the Congress required the abandonment of the use of the link and pin coupling of cars, and other appliances used on cars, and the substitution therefor of automatic couplers and other appliances prescribed. Congress authorized the Commission, after proper investigation, to designate the appliances that should be used on cars. These appliances, by the provisions of the Safety Appliance Act, and by the construction placed upon those acts by this Court, are required to be installed on cars and engines which are used in transporting both state and interstate commerce.

By the provisions of these Safety Appliance Acts, the carriers by railroad were required to abandon and destroy a large amount of property then in use, and substitute, at their own expense, new and different appliances. If Congress could **require** by its regulations the abandonment of the use of appliances, and the substitution of different appliances, then we submit that Congress can **permit** the abandonment of any instrumentality where used in both state and interstate commerce, upon the application of the carrier, where the public convenience and necessity does not require the continued use thereof.

By various decisions of this Court, the Act to Regulate Commerce, together with the amendments thereto, and the Acts supplemental thereto, had been recognized as a general system of regulation of interstate commerce prior to the passage of the Transportation Act. At the time of the passage of that Act Congress was confronted with the duty and responsibility of returning the transportation sys-

tems of the country to the owners thereof; and also with the necessity of the country for an adequate transportation system. In order to determine what additional regulations were necessary, the Congress went into an exhaustive investigation of the entire subject; after such investigation the Transportation Act of 1920 was prepared and passed. This Act included many new regulations. The ones which are important to be kept in mind in considering the questions involved in the case at bar are:

The broadening of the authority of the Commission over rate-making; the granting to the Commission of the authority to supervise the capitalization of railway companies and systems; the provisions authorizing a carrier by railroad to apply for loans from the United States, and conferring upon the Commission the authority to investigate such applications, and certify their conclusions to the Secretary of the Treasury of the United States; and the granting to the Secretary of the Treasury upon receipt of such certificate, authority to make loans, and prescribe the form of the obligation securing the same, and the creation of certain Labor Boards to investigate controversies as to wages and working conditions.

There was also included the regulation of the extension or abandonment of a line of railway. In this regulation the extension of a line of railway was prohibited until the carrier applied to the Interstate Commerce Commission and procured from it a certificate that the extension was **required** by the public convenience and necessity. In the case of the abandonment of a line of railway, or any part

thereof, the abandonment was prohibited until the carrier applied to, and secured from the Commission, a certificate that the public convenience and necessity **permitted** such abandonment.

Each and all of these provisions show in their manner and form, that Congress intended the regulation to be the exercise of a sovereign power over the subject involved. However, it was made plain that the Commission, and other officers of the United States, were expected to co-operate with the carriers, and the states, to effect the purposes of Congress.

Keeping in mind this view of the Transportation Act, we submit that the words "without other approval" used in paragraph 20, added to Section 1 of the Act to Regulate Commerce, were intended by Congress to mean **without the approval of any other authority, state or federal**. Any other construction of these words, or any limitation of them to federal approval, is entirely contrary to the spirit of the Transportation Act. We must assume that Congress knew of the provisions in the laws of the various states with reference to the extension and abandonment of a line of railway, and that Congress intended to substitute for all of such provisions, the enactment contained in paragraphs 18, 19, 20 and 21 of Section 402 of that Act.

We must also assume that the provisions contained in these paragraphs were prepared with reference to and with the utmost consideration of the decisions of this court, for it is manifest from the wording of the paragraphs, that such

provisions conform to the principles announced in the decisions of this court.

On the question of investigations made by Congress, either in the passage of an Act, or provisions made for such investigations before an Act should become effective, we refer to the case of Simpson vs. Shepard (Minnesota Rate Case) 230 U. S. 352, 57 L. ed. 1511. After an exhaustive review of the entire question of the power of Congress and of the states, this court at page 432, L. ed. 1555, said:

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this Court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon."

This court then proceeded in said case to show the very great difficulty there was in apportioning the value of the property used in intrastate commerce and the value used in interstate commerce, so as to determine whether the

intrastate rates were reasonable and just or not. The analysis of the situation showed that the difficulties were almost insurmountable. At page 465, L. ed. 1568, this court said with reference thereto:

The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton mile, shows both the difficulty and the lack of certainty in passing judgment.

We are of opinion that, on an issue of this character, involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation."

As stated Congress was familiar with the decisions referred to and the difficulties pointed out. So when it came to formulate an Act with reference to the extension or abandonment of a railroad, it authorized both. Then it provided a method whereby the facts as to public convenience and necessity could be ascertained. When this had been done and certified by the Interstate Commerce Commission, then Congress declared that such extension or abandonment could be proceeded with without securing other approval than such certificate, the purpose being to eliminate all question of public convenience and necessity, either as to interstate traffic or intrastate traffic.

This was a new regulation by Congress, and was complete in itself.

In the foregoing, we have referred to the Minnesota

rate case, but many other cases have pointed out similar difficulties, and we assume that those cases were thoroughly understood by the Congress.

THE PETITION AND BILL OF COMPLAINT OF APPELLANTS IS WITHOUT EQUITY.

It must be kept in mind that under the established law of the State of Texas, the State, when it comes into court as a litigant, thereby accepts the same position as an individual or corporation when either of those parties institute proceedings in court.

Announcing the law on this subject, the Supreme Court of the State in the case of Fristoe vs. Leon & H. Blum, 92 Texas Reps. at page 80, said:

"A clear understanding of the relation in which the state stands to the purchasers in these contracts will greatly facilitate a proper solution of the questions upon which this case depends. It is well settled that so long as the State is engaged in making or enforcing laws or in the discharge of any governmental function it is to be regarded as a sovereign and has prerogatives which do not appertain to the individual citizen, but when it becomes a suitor in its own courts or a party to a contract with a citizen the same law applies to it as under like conditions governs the contracts of an individual."

Appellants do not claim, either in their petition and Bill of Complaint, or their assignments of error, or their brief, that the State would sustain any pecuniary loss or damage by the abandonment of the line of railway of the Eastern

Texas Railroad Company. Measuring the state's rights as a litigant by those of a citizen, the petition does not for this reason state any cause of action. The political rights of the State in the sense in which they are presented in the Petition and Bill of Complaint, do not constitute a cause of action cognizable in court.

Whether a question is cognizable by the Legislative branch or the Judicial branch of the government is the same with reference to the state or the United States.

In considering questions of this nature, this court, in the case of Simpson vs. Shepard (Minnesota rate case) 230 U. S. 352, 57 L. ed. 1511, heretofore cited, at page 399, L. ed. 1541, said:

"This reservation to the States manifestly is only of that authority which is consistent with, and not opposed to, the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the comingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from

the supremacy of the national power within its appointed sphere."

The exercise of the power conferred upon Congress by the Constitution could not result in giving the state a cause of action which can be maintained in court.

Cooley's Constitutional Limitation, 7th. Edition Chapter 4, pages 71-74.

In the case of People vs. Barrett, 203, Ill. 99, 67 N. E. 742, 96 American State Reports 296, the Supreme Court of Illinois had before it a question of contempt for violating an injunction issued, enjoining an election Board from producing and counting ballots in a contested election case. In passing upon the case, the court announced the law to be:

"It is elementary that the subject matter of all chancery jurisdiction is property and the maintenance of civil rights, and that matters of a political character do not come within its jurisdiction."

The cases of State of Georgia vs. Edward M. Stanton, U. S. Grant and Jno. Polk, and the State of Miss. vs. Stanton U. S. Grant and E. O. Cord, 6 Wallace, 50, 18 L.ed. 721 were cases in which the States filed an original suit in this court against the Secretary of War, et al., for the purpose of restraining the defendants from carrying into execution the provisions of an "Act to provide for the more efficient government of the rebel states." A motion was made to dismiss the Bill for want of jurisdiction of the subject matter set forth in the Bill, the motion alleging that the matters

set up were political and not judicial, and therefore, not of judicial cognizance. In summarizing the Bill this court said at page 76:

"It will be seen that we are called upon to restrain the defendant, who represents the executive authority of the government in carrying into execution certain acts of Congress, in as much as such execution would annul and totally abolish the existing state government of Georgia"

Upon the allegation made, this court held the cause of action attempted to be set up was political, and dismissed the Bill.

See also Fletcher vs. Tuttle, 161 Ill. 41, 42 Am. St. Rep. 220.

In the case at bar the State of Texas as a sovereign state is complaining of the United States, another sovereign, for infringing upon the sovereign rights of the State of Texas, and does not show that the property rights of the State of Texas were injured thereby.

CHARACTER OF ORDER MADE BY THE COMMISSION

Appellant's claim that the order made by the Interstate Commerce Commission on the abandonment herein involved was a negative order. We conclude this contention cannot be sustained. The paragraphs of the Transportation Act involved contain a grant of a right made by Congress to a Railway Company to abandon its line of railway, but before this grant attaches the Congress required that any railroad desiring to procure the benefits of such grant, must

apply to the Interstate Commerce Commission and secure a Certificate of Public Convenience and Necessity from the Commission, after which the right granted could be exercised. The action of the Commission is an affirmative action. It establishes the existence of the fact that the public convenience and necessity permitted the abandonment of the railroad, and is in no sense negative.

U. S. vs. A. T. & S. F. Ry. 234, U. S. 476, 58 L. ed. 1408
U. S. vs. Louisiana R. R. Com. 234 U. S. page 1, 58 L. ed. 1185.

FINDINGS OF FACT BY THE COMMISSION ARE CONCLUSIVE.

On this point we cite Mfgrs. Ry. vs. U. S. 246 U. S. 851, 62 L. ed. 847, holding that all parties should submit their evidence to the Commission, and that so long as the Commission proceeds in accordance with the requirements of the Commerce Act, and its amendments, with proper regard for constitutional restrictions, such orders are not subject to revision by the courts.

We also cite

T. & P. Ry. vs. Abilene Oil Co. 204 U. S. 226, 51 L. ed. 553;
Loomis vs. Lehigh Valley Ry. 240 U. S. 43, 60 L. ed. 517
U. S. vs. L. & N. Ry. 235 U. S. 314.

THE EASTERN TEXAS RAILROAD COMPANY HAD A
RIGHT TO ABANDON ITS LINE WHEN THE
REVENUES DERIVED FROM THE OPERA-
TION WOULD NOT PAY OPERATING
EXPENSES.

We submit that when the Railway Company secured its charter, it became obligated to furnish adequate service at reasonable rates, but on the other hand there was an obligation on the part of the public to furnish sufficient transportation to pay operating expenses, and a reasonable return on the value of the property. When this was not done, the Railway Company was entitled to abandon its service.

Upon this question we cite:

Brooks-Scanlon Co. vs. R.R. Commission of La. U. S. Supreme Court, Advance Opinions, 1919-1920, Nos. 8 and 9, March 1 and 15, page 212.

Jack vs. Williams 113 Federal; which was affirmed on appeal to the Circuit Court, 145 Federal 281.

Central Bank & Trust Co. vs. Cleveland 252 Federal 530.

State of Iowa vs. Old Colony Trust Co. 215 Federal 307.

These authorities justified the Interstate Commerce Commission, to whom they were presented, in authorizing the abandonment of the Eastern Texas Railroad.

The findings of fact made by the Commission were very full on this subject, and on the effect of these findings

and the right of the trial court to dismiss the bill, we cite: Cincinnati, Hamilton & Dayton R. R. Co. vs. I. C. C., 306 U. S. 142, 51 L. ed. 1000, in which cause, at page 154, this court says:

"The Statute gives *prima facia* effect to the findings of the Commission, and, when those findings are concurred in by the Circuit Court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed."

See also I. C. Ry. Co. vs. I. C. C. 206 U. S. 441; 51 L. Ed. 1128.

In the case of I. C. C. vs. Union Pacific Ry. 222 U. S. 541; 56 L. Ed. 308, Mr. Justice Lamar speaking for this court, at page 447, L. Ed. 311, said:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or, (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or, (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow,

determines the validity of the exercise of the power. Interstate Commerce Commission vs. Illinois C. R. Co. 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155, Southern P. Co. vs. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283 Sup. Rep. 288 Interstate Commerce Commission vs. Northern P. R. Co. 216 U. S. 544, 54 L. ed. 609, 30 Sup. Ct. Rep. 417; Interstate Commerce Commission vs. Alabama Midland R. Co. 168 U. S. 146, 174, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience". Illinois C. R. Co. vs. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Upon this brief and authorities cited, these Appellees submit this cause.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,

Solicitors for Appellees, St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; and Eastern Texas Railroad Company.



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NOV 7 1921

WM. R. STANSBURY

CLERK

In Equity No. 563.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE STATE OF TEXAS ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

WALTER McFARLAND,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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THE UNITED STATES OF AMERICA,
Interstate Commerce Commission
et al., appellees. } In Equity,
No. 563.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

On June 3, 1920, the Eastern Texas Railroad Company made application to the Interstate Commerce Commission, hereinafter termed the Commission, for a certificate of public convenience and necessity to abandon all of its lines of railway between Lufkin, Tex., and Kennard, Tex., pursuant to the provisions of paragraphs (18) to (21), inclusive, of section 1 of the interstate commerce act (Rec. 31). The paragraphs mentioned, together with a companion paragraph designated (22), were added to section 1 of the interstate commerce act by section 402 of the transportation act, 1920, approved, February 28, 1920, 41 Stat., 456, 477. For the convenience of the court they are reproduced as an appendix hereto.

Upon receipt of the application, which was docketed as Finance Docket No. 4, the Commission instituted a proceeding of investigation into the matters presented by the application and caused notice of the application to be given to and copy to be filed with the governor of the State of Texas, and caused said notice to be published for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operated (Rec. 31). A hearing was held before an examiner for the Commission at which a large volume of evidence, both oral and documentary, was introduced. The oral testimony was reduced to writing by the reporter for the Commission and a copy thereof bound with the documentary evidence in the record. Subsequently briefs were filed by interested parties, the case was argued before the Commission, and was duly submitted for decision. On December 2, 1920, the Commission made its report (Rec. 27) and certificate of convenience and necessity (Rec. 31) in Finance Docket No. 4, which are here under attack. The report and certificate are substantially as set forth in Exhibit A of the bill of complaint. The certificate authorized the Eastern Texas Railroad Company to abandon its line of railway between Lufkin and Kennard. For a full statement of the Commission's findings, the court is respectfully referred to said report and certificate of the Commission. The report, which is by refer-

ence made a part of the certificate, is in part as follows:

Applicant's line was constructed primarily to serve the lumber company which then owned 116,000 acres of pine-timberland near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the south for the production of lumber and forest products. Applicant built numerous tramroads through this timber to connect with its main line. On August 28, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value \$94,604.49, to the lumber company. This sale was made in contemplation of the transfer of the Eastern-Texas stock to the Southwestern for bonds of that company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

The Ratcliff mill ceased operation about 1917, and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line.

Applicant contends that since the removal of the mill there is not, and within any reasonable time will not be, enough traffic offered to produce revenue sufficient to pay its operating expenses. It shows that the country it serves is largely cut-over timberland, the soil poor, and the agricultural development very limited except in the vicinity of Ratcliff and Kennard. It points out that the area is sparsely settled, particularly between those two towns where

it is estimated that some 600 people live; and that there are no other towns or villages along the line. Ratcliff is said to have a population of 900 and that of Kennard is estimated at 1,200. The timber from some 20,000 acres of land, along applicant's line, owned by the Southern Pine Lumber Company is transported either by the Texas Southeastern Railroad or the Groveton, Lufkin & Northern Railway. Three small mills, installed after the abandonment of the Ratcliff mill on account of the then abnormally high prices of lumber and forest products, ceased operating with the decline in the lumber market and were closed at the time of the hearing. The lumber company now owns about 84,000 acres of land surrounding Ratcliff and Kennard on some of which the second growth of timber is said to be of marketable size, but it is not yet in condition to be profitably cut.

About 70 per cent of the traffic handled by the Eastern Texas in 1919 consisted of forest products. Agricultural products totaled less than 10 per cent, and the remaining 20 per cent was made up of mine products, animals, manufactured products, merchandise and other commodities. During each year of the 4 years immediately preceding June 30, 1913, mine products, consisting chiefly of bituminous coal used at the Ratcliff mill, exceeded the products of agriculture and animals combined; but the coal tonnage decreased from 6,886 tons in 1913 to 36 tons in 1918, and no coal moved in 1919, nor during the first 5 months of 1920. The greatest volume of

agricultural products moved since 1909 was the 6,592 tons carried in 1914. This traffic had decreased to 2,072 tons in 1919, and 1,038 tons was moved in the first 5 months of 1920. The tonnage of forest products from 1909, to 1917, ranged from 41,312 tons in 1915 to 66,936 tons in 1917. Only 25,738 tons of this traffic moved in 1918, 14,966 tons in 1919, and 9,958 tons in the first 5 months of 1920. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first 5 months of 1920. Exhibits offered showed a detailed statement of the freight tonnage handled by applicant from 1909 to 1920.

The income of the Eastern Texas shows a corresponding shrinkage since 1912 except for the year 1917. Applicant's gross income for the year ended June 30, 1920, was \$34,210 and its net income \$24,494.21. The corresponding figures for 1917 were \$17,336.95 and \$6,391.57. Its operating expenses exceeded its operating revenues by \$9,699.66 in 1918, by \$4,086.15 in 1919, and by \$24,207.10 in the first 5 months of 1920. The total deficit incurred in 1918 was \$20,128.46, in 1919 it was \$49,362.64 and in January and February of 1920 it was \$10,484.27. The Eastern Texas was under Federal control during 1918, 1919, and the first 2 months of 1920, and its net corporate income was \$2,942.36 in 1918 and \$5,041.74 in 1919. There was a deficit of \$2,033.19 for March, 1920, \$4,455.54 for April, 1920, \$11,703.96 for May, 1920, and applicant estimated its total deficit for the year would be

\$68,824.68, exclusive of large expenditures necessary for maintenance of way to place the road in safe operating condition. Applicant's general balance sheet shows a credit balance of \$32,393.68 on May 1, 1920.

Applicant states it will furnish bond in the sum of \$100,000 for the cancellation of all of its outstanding obligations, and that the Southwestern will guarantee said bond and advance to applicant sufficient funds to pay or secure the payment of wages, accrued taxes, claims, loans, bills payable and all other lawful obligations outstanding at the date of abandonment, if abandonment is authorized, whether the indebtedness or obligation is or is not audited and reflected in applicant's account, and whether the claim has been or may later be presented.

Rates to and from Lufkin apply to and from Ratcliff and Kennard on interstate traffic, which comprises approximately 75 per cent of applicant's total tonnage. The divisions between the Eastern Texas and the Cotton Belt are said to be on a more liberal basis than is ordinarily allowed individual short line connections, and applicant contends that it would be impossible to increase its rates or divisions in an amount sufficient to make its revenues meet its operating expenses. Its operating ratio was 440 per cent under the rates in effect immediately prior to the increases authorized in *Increased Rates, 1920*, 58 I. C. C., 220.

The Eastern Texas was originally well laid out from an engineering standpoint, the roadbed

being generally level and the grades and curves short. The maximum gradient is slightly more than 1 per cent and the sharpest curve is about 4 degrees. The line was laid with 35-pound steel rails which are not badly worn but are both line and surface bent to such an extent that it is said trains can not safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills, there are 50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition. Six bridges and trestles, with a combined length of 2,282 feet, are in need of immediate renewal to insure safe operation and all of the others require heavy repairs. Embankments and fills have fallen away, particularly at bridge and trestle approaches, to such an extent that the ties are not properly supported. The slopes of cuts and ditches have fallen in, damaging the draining so that, in many places, ties are covered with dirt. Applicant estimates that if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss.

* * * Objectors testified as to the general conditions of the territory and the prospects for further increases in tonnage, but

made no definite showing that within a reasonable time, there would be sufficient tonnage to pay the operating expenses of the road. To meet their objections, applicant has offered to sell its line to any local interests for \$50,000.

Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of \$50,000. A certificate and order to that effect will be issued.

In the bill of complaint (Rec. 1) it was alleged in substance that paragraphs (18) to (22), inclusive, of the interstate commerce act are unconstitutional (Rec. 17, 19 and 20) for the reason that Congress exceeded its power to regulate interstate and foreign commerce and invaded the rights of the State of Texas to regulate corporations chartered by it; and that the order of the Commission was invalid because beyond its statutory powers, unconstitutional and not supported by evidence (Rec. 22). The appellants prayed in substance that an interlocutory injunction be granted against the appellees during the pendency of the suit; that the Commission's report, findings and order be set aside; that paragraphs (18) to (22), inclusive, of section 1 of the interstate commerce act be declared unconstitutional; that writs of mandamus and prohibition be

issued; and that a permanent injunction be granted against action under the Commission's report and order (Rec. 25, 26).

The United States filed a motion to dismiss the petition and bill of complaint (Rec. 44). The Commission filed a motion to dismiss the bill as to it (Rec. 46); and, without waiving its objection to the sufficiency of the bill of complaint, also filed its answer (Rec. 47).

In the Commission's motion it was alleged—

1. That it affirmatively appears in the petition and bill of complaint, hereinafter termed the bill of complaint, that the certificate of convenience and necessity, set out in Exhibit A thereof, made by the Commission on December 2, 1920, is not an order of the Commission within the meaning of section 1 of an act approved June 18, 1910, 36 Stat., 539, and of the subdivision headed "Judicial" of an act approved October 22, 1913, 38 Stat., 208, 219, under which plaintiffs seek to maintain this suit.
2. That the said bill of complaint does not state a cause of action entitling the plaintiff to the relief, or any part thereof, prayed for in said bill of complaint.

Upon hearing the District Court made its final order (Rec. 50), the pertinent portions of which are as follows:

1. That the motion filed by the United States to dismiss the petition and bill of

complaint be and the same is hereby sustained, and that the petition and bill of complaint be and the same is hereby dismissed, to which ruling of the court the plaintiffs, by their counsel, then and there in open court, objected and excepted.

2. That the motion filed by the Interstate Commerce Commission to dismiss the petition and bill of complaint be and the same is hereby sustained, and that the petition and bill of complaint be and the same is hereby dismissed, to which ruling of the court the plaintiffs, by their counsel, then and there, in open court, objected and excepted.

3. And thereupon, in open court, the plaintiffs, by their counsel, prayed an appeal to the Supreme Court of the United States from the foregoing final order, which appeal was in open court allowed as prayed.

The complainants below appealed from this order, alleging (Rec. 51) that there was manifest error in—

1. Holding that there was no equity in the bill of complaint.

2. Dismissing the bill as to the carriers upon the motion of the United States and the Commission.

3. Dismissing the bill and thereby denying appellants the right to attack the order of the Commission in the manner prescribed by law.

ARGUMENT.

I. The certificate of convenience and necessity, made by the Commission on December 2, 1920, is not an order within the meaning of the statutes conferring upon the district courts jurisdiction of "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission,"

We are not familiar with any case in which this precise question has been determined by any court. It must be decided from an examination of paragraphs (18) to (22), inclusive, of section 1 of the interstate commerce act, and of decisions construing the statutes under which this action is sought to be maintained. The statutes in question are section 1 of an act approved June 18, 1910, 36 Stat., 539, and the subdivision headed "Judicial" of an act approved October 22, 1913, 38 Stat., 208, 219.

It will be seen from reading said paragraphs (18) to (22) that Congress, among other things, laid down certain rules of conduct in paragraph (18) regarding the abandonment of all or any portion of a line of railroad, or the operation thereof, by a carrier subject to the interstate commerce act; prescribed in paragraph (19) the procedure to be followed in giving a full hearing; and in paragraph (20) provided that the Commission should have power to issue the certificate, either as prayed for, or in part, or with conditions attached, or to refuse to issue such certificate.

Paragraph (21) provides that, under certain circumstances, the Commission may "authorize or

require by order any carrier by railroad subject to this Act, party to such proceeding, * * * to extend its line or lines." The attention of the court is invited to the distinction which Congress has observed between the certificate of convenience and necessity, which is essentially permissive even though some conditions may be attached which will require affirmative action in case the permission is accepted, and the order requiring affirmative action which is provided for in paragraph (21). It seems clear that in issuing or refusing to issue a certificate of convenience and necessity the Commission merely exercises its discretion in a matter confided to its jurisdiction and that the courts will not interfere to control that discretion, by requiring the Commission either to issue or to refuse to issue such certificate.

In *Procter & Gamble v. United States*, 225 U. S., 282, the court had before it an attempt to have set aside an order of the Commission dismissing a complaint. The Supreme Court held that the Commerce Court was given jurisdiction only to entertain complaints as to affirmative orders of the Commission. This is the jurisdiction which, on October 22, 1913, was transferred to the district courts.

In *Lehigh Valley R. R. Co. v. United States*, 243 U. S., 412, the Supreme Court had before it an appeal from a decree of a District Court, three judges sitting, dismissing a bill to prevent the enforcement of an order of the Commission. The Commission's order dismissed a petition of the appellant under the Panama Canal act, 37 Stat., 560, 566, for an extension

of the time during which it might continue to operate its boat line. The Supreme Court held that the order was negative in substance and form, and that there was nothing for a court of equity to enjoin.

In *United States v. Illinois Cent. R. R. Co.*, 244 U. S., 82, this court held that an order of the Commission assigning a case for hearing is not an order which a District Court has jurisdiction to enjoin under 36 Stat., 539, Judicial Code, section 207, saying:

The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & Gamble Co. v. United States*, one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree.

The District Court, in making its order sustaining the motion of the Commission that as to it the bill of complaint should be dismissed, did not render an opinion or specify whether its action was based upon the ground that the certificate of convenience and necessity was not an order within the meaning of the statutes, or upon the ground that the bill did not state a good cause of action, or both. It is manifest that if either ground is sound the order must be sustained.

The Commission has taken the position indicated in this subdivision of the argument, not with any wish to defeat review by the courts of its certificates of convenience and necessity on the grounds outlined by this Court in the *Proctor & Gamble case, supra*, and other decisions, if such certificates are orders within the meaning of the statutes, but to present the matter in such a manner that a ruling can be secured on a doubtful question in the first case in court affecting such certificates.

II. The Commission acted in conformity with the authority conferred upon it by the statute under which it operated.

A comparison of the procedure followed by the Commission in this case, as set forth in the answer (Rec. 47) and in the statement of the case, *supra*, with that outlined in the statute will show that the Commission acted strictly within its statutory powers. Due notice was given and full hearing was accorded all parties who desired to be heard.

As stated above, Congress empowered the Commission, after holding a hearing as directed, to exercise its discretion as to issuing or refusing to issue a certificate. While plaintiffs allege that in doing so the Commission exercised judicial powers, it seems clear that it was exercising quasi-legislative or administrative functions under powers delegated, and under conditions prescribed, by Congress. It is of interest, in connection with this contention that the Commission was exercising judicial powers, to note from the bill of complaint that the deter-

mination of whether or not a railroad should be allowed to abandon its line of road is, under the laws of Texas, committed to the legislature or railroad commission of that State (Rec. 5, 18, and 21).

It has become well established that the courts will not interfere to control the Commission's decisions made in the exercise of its administrative discretion. In *Procter & Gamble v. United States, supra*, the court said, page 297:

Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so.

And in *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S., 452, 470, 478, where the court was considering the validity of an order of the Commission, it said:

Power to make the order, and not the mere expediency or wisdom of having made it, is

the question. * * * Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils.

The record before the Commission was not placed in evidence. Under these circumstances it would be impossible for the court to say that the Commission acted without evidence. In a somewhat similar situation this court said in *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S., 117, 125:

But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced.

See also, *O'Keefe v. United States*, 240 U. S., 294, 302, and *Louis, & Nash, R. R. Co. v. United States*, 245 U. S., 463, 466, wherein it was held that whether or not there was evidence to support the Commission's findings must be tested by a consideration of the evidence that was before the Commission.

As shown by the Commission's report, the tonnage handled by the Eastern Texas Railroad has fallen off greatly, since the removal of the Ratcliff mill, with a corresponding diminution of its revenues. Its operating expenses exceeded its operating revenues in 1918, 1919, and the first five months of 1920. Its operating ratio was 440 per cent under the rates in effect prior to the increase authorized in *Increased Rates*, 1920, 58 L. C. C., 220. If the road is to continue to operate, large amounts must be expended on roadway, bridges and trestles, with no reasonable expectation of earning operating expenses, let alone a return on the investment. Under the circumstances, and in view of this court's decision in *Brooks-Scanlon Co. v. R. R. Comm.*, 251 U. S., 396, the action taken by the Commission hardly can be called arbitrary.

III. Congress had the power to enact paragraphs (18) to (22), inclusive, of section 1 of the interstate commerce act.

It is a matter of common knowledge that, at the time the transportation act, 1920, was enacted, the problem of what to do with the railroads of the country which were engaged in interstate and foreign commerce was acute. Hearings were held by committees of the Senate and House, and a number of bills were introduced by senators and representatives. It was generally conceded that the railroads and systems of transportation under Federal control could not safely be turned back to their owners without legislation

of some sort designed to assist and protect them as instrumentalities of interstate and foreign commerce. Some of the provisions of the transportation act are of a temporary nature. Others, such as the provisions under attack, are permanent. All show an intent on the part of Congress to deal with the transportation problem in a comprehensive way. In the report of November 10, 1919, by the Senate Committee on Interstate Commerce to the Senate, accompanying S. 3288, it was said, page 18:

Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint.

Under the interstate commerce act, as amended by the transportation act, provision is made, among other things, by section 5, for the consolidation of carriers by railroad subject to the act, as defined in that section, into a limited number of systems under a national plan of consolidation adopted by the Commission (41 Stat., 480); the Commission is directed by section 15a to initiate, modify, establish or adjust rates which shall yield to carriers subject to the act, as defined in that section, a fair return upon the aggregate value of their railway property, devoted to the public use, as a whole or as a whole in each rate group which the Commission may designate (41 Stat., 488); and under section 20a the Commission is given power to regulate the issuance of securities by carriers

by railroad subject to the act, as defined in that section (41 Stat., 494).

The provisions now under attack are a part of a general scheme of legislation and can not be isolated and considered as if they were a separate and unrelated statute. That is, in order to assure adequate transportation facilities to the public, Congress has directed its agency, the Commission, to see that a fair return is yielded upon the aggregate value of the railroad property of the various instrumentalities of interstate commerce. And, as a part of the general scheme of regulation, it has given the Commission jurisdiction to determine in any case whether a carrier by railroad engaged in interstate commerce, which desires to abandon operation, should be permitted to do so; or whether a carrier engaged in interstate commerce shall be permitted to extend its line of railroad or to construct a new line of railroad.

On page 6 of appellants' brief it is said:

* * * At the same time Congress seemed to have recognized that certain carriers would be a burden to the entire group because they would not earn more than the operating expense, and their values added to the total values would demand the fixing of a higher rate for all of the territory to which such carrier would not contribute its proportionate share. It was, therefore, provided that such carrier may be relieved either upon their own application or upon the Commission's initiative from engaging in interstate commerce—

as expressed by counsel in arguing the case in the court below, there would be dead limbs which a good husbandman would see fit to prune from its tree. To this theory, and thus far, we subscribe. We assert, however, that when Congress had withdrawn interstate commerce from such carriers, by giving permission for their abandonment, the full purpose of the act has been accomplished and no further action was authorized.

Appellants' theory, apparently, is that the certificate issued by the Commission simply authorizes the Eastern Texas Railroad to withdraw from the transportation of interstate commerce, and that this is all that the act contemplates, Congress having no power over intrastate commerce. With this interpretation of the statute we are unable to agree. A perusal of the certificate issued by the Commission will show that the carrier is "authorized to abandon the operation of all of said lines of railway now owned and operated by it * * * (Rec. 32)." Under paragraph (20), section 1, of the interstate commerce act, the carrier may proceed to comply with the terms and conditions in the certificate and proceed to abandon the operation of its road, "without securing approval other than such certificate * * *."

Aside from the legal and practical difficulties which would be encountered in attempting to restrict transportation to intrastate commerce, while refusing to carry similar interstate shipments, and which, to our minds, would prove insurmountable,

the unsoundness of the theory is demonstrated by the fact that it would effectually prevent the regulation of interstate carriers in this particular by Congress. Seventy-five per cent of the traffic of the Eastern Texas Railroad is interstate (Rec. 30). It is obvious that, if, as has been found by the Commission, the road can not support itself on all the traffic handled, it certainly could not live on 25 per cent of such traffic. Refusal by the State to permit abandonment would, under appellants' theory, make it impossible for the carrier to avail itself of the certificate issued by the Commission and thus destroy the power of Congress to prescribe the rule for the interstate carrier.

There is no occasion in this brief for tracing the history of the commerce clause or reviewing at length the many decisions wherein this court has expounded the powers of Congress under that clause and found them adequate to meet the changing conditions which the development of our country and of the means of transportation have presented from time to time.

The general rule as to legislation was stated as follows in *McCulloch v. Maryland*, 4 Wheat., 316, 420:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

It will be observed that the provisions of the statute under attack here are restricted to carriers by railroad subject to the interstate commerce act, i. e., carriers engaged in interstate commerce. The fact that regulation of such carriers may incidentally affect their relations to intrastate traffic can not destroy the power of Congress to deal with them. *Southern Ry. Co. v. United States*, 222 U. S., 20; *Nor. Pac. Ry. v. Washington*, 222 U. S., 370; *Southern Ry. Co. v. Reid & Boom*, 222 U. S., 444; *Atlantic Coast Line v. Georgia*, 234 U. S., 280, 292. In *Houston & Texas Ry. v. United States*, 234 U. S., 342, the court said, page 350:

It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.

Gibbons v. Ogden, 9 Wheat., 1, 196, 224; *Brown v. Maryland*, 12 Wheat., 419, 446; *County of Mobile v. Kimball*, 102 U. S., 691, 696, 697; *Smith v. Alabama*, 124 U. S., 45, 473; *Second Employers' Liability Cases*, 223 U. S., 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S., 352, 398, 399.

Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact “all appropriate legislation” for its “protection and advancement” (*The Daniel Ball*, 10 Wall., 557, 564); to adopt measures to promote its growth and insure its safety” (*County of Mobile v. Kimball*, *supra*); “to foster, protect, control and restrain” (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from

the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.

Great stress is laid by plaintiffs upon their alleged contractual rights. This is merely another way of saying that a State can regulate interstate commerce or prevent Congress from regulating interstate carriers, for the form in which the State seeks to exercise the asserted power, whether in a State constitution, a statute, an order of a State commission or a charter or contract, can not change the substantial question as to whether the Nation or the State is supreme in regulating interstate commerce and the instrumentalities employed therein. In *Louisville & Nashville R. R. v. Motley*, 219 U. S. 467, 482, the court said:

The agreement between the railroad company and the Motleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power

in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist.

In *Wilson v. New*, 243 U. S., 332, this court said, at page 349:

That the power to regulate also extends to many phases of the business of carriage and embraces the right to control the contract power of the carrier in so far as the public interest requires such limitation, has also been manifested by repeated acts of legislation as to bills of lading, tariffs and many other things too numerous to mention.

Appellants attempt to use the contract between the State of Texas and the Eastern Texas Railroad to defeat the exercise by Congress of its power under the commerce clause. Whatever may be the rights and obligations of the parties named as between themselves, they can not be asserted in such a manner as to oust Congress of its power. In that respect the contract of the State of Texas stands in no different position from any other contract affecting the operation or regulation of interstate carriers. To appellants' theory, which, if sustained, would go far to destroy the well-rounded plan of regulation embodied in the interstate commerce act, the words of Chief

Justice Marshall in *Gibbons v. Ogden*, 9 Wheat., 1, 188, may well be applied:

If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument— for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent— then we can not perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.

It is respectfully submitted that the Commission conformed to the statutory authority conferred upon it, that it did not act arbitrarily, but based its report and certificate upon the evidence adduced before it, that the statute is constitutional and that the order of the District Court should be affirmed.

WALTER McFARLAND,
*Counsel for the Interstate
 Commerce Commission.*

P. J. FARRELL,
Of Counsel.

APPENDIX.

Paragraphs (18) to (22), inclusive, of section 1 of the interstate commerce act.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or

any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18)

of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.



**BRIEF
FOR
THE
UNITED
STATES**

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE STATE OF TEXAS AND C. M. CURETON,
personally and as Attorney General
for the State of Texas, appellants,

v.

UNITED STATES OF AMERICA, AND CHARLES
C. McChord, et al., constituting the In-
terstate Commerce Commission, et al.,
appellees.

NO. 563.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal is from a final decree of the District Court dismissing an original petition filed by the State of Texas to annul and enjoin the action of the Interstate Commerce Commission (Tr. 27, 31) in issuing a "Certificate of public convenience and necessity" (Tr. 31) to Eastern Texas Railroad Company authorizing the latter to abandon its railroad.

The District Court (Circuit Judge Walker and District Judges West and Estes all concurring) unanimously sustained a motion of the United States to dismiss (Tr. 50).

Without serious question of the sufficiency of the application of Eastern Texas Railroad Company to the commission for the certificate, or the regularity of the proceedings before that body, the whole case rests on the broad proposition that paragraphs (18), (19), (20), (21), and (22) of section 492, of the Transportation Act, 1920 (11 Stat. 477), are unconstitutional.

I.

THE FACTS.

Eastern Texas Railroad Company, as found by the commission (Tr. 27), filed its application for a certificate of public convenience and necessity to abandon its railroad extending from Lufkin, Angelina County, Tex., in a westerly direction 30.3 miles to Kennard, Houston County, Tex., with 4 miles of switches. At Lufkin the tracks connect with those of St. Louis Southwestern Railway, the Houston, East & West Texas, the Groveton, Lufkin & Northern Railway, the Texas Southeastern Railroad, and the Angelina & Neches River Railroad. It maintains a joint agency with the St. Louis Southwestern at Lufkin, and has agency stations at Ratcliff and Kennard. At other points it has 6 side tracks at which carload freight may be received or delivered. It owns 1 combination passenger, mail, and express car and has no other rolling stock. It rents 1 light locomotive

from St. Louis Southwestern. The only regular service is one mixed freight and passenger train daily, except Sunday, between Lufkin and Kennard.

Eastern Texas Railroad was incorporated under the general railroad incorporation laws of Texas, November 8, 1900, to construct a railroad from Lufkin to Crockett, Texas. It was promoted and financed by persons interested in Texas, Louisiana Lumber Co., a subsidiary of Central Coal & Coke Co. of Kansas City. It never received a land grant from the State, or exercised the right of eminent domain. Of its authorized capital stock (\$1,000,000) shares with the par value of \$154,500 have been issued. There are no bonds. On September 1, 1906, St. Louis Southwestern acquired all of the outstanding capital stock. The two companies have substantial identity of officers. On two attempts to consolidate since the purchase of the stock by the St. Louis Southwestern, the Legislature of Texas has refused permission unless Eastern Texas would agree to extend its line to Crockett, a town in Texas.

Eastern Texas Railroad was constructed primarily to serve the lumber company which then owned 116,000 acres of pine timber land near Kennard and which had constructed at Ratcliff one of the largest mills in the South. The mill ceased operations about 1917 (Tr. 28).

Eastern Texas Railroad largely serves cut-over timber lands. The soil is poor and the agricultural development is very limited except in the vicinity

of Ratcliff and Kennard. The area is sparsely settled, particularly between the two towns mentioned, where about 600 people live. There are no other towns or villages along the line. Ratcliff has a population of 900 and Kennard 1,200. The timber from approximately 20,000 acres of land along the line is transported by other companies (Tr. 28).

Seventy per cent of the tonnage handled by the Eastern Texas in 1919 was forest products. Agricultural products were less than 10 per cent, and the remaining 20 per cent consisted of mixed commodities. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first five months of 1920.

The income of the Eastern Texas shows corresponding shrinkage. Its operating expenses exceeded its operating revenues by \$9,699.66 in 1918, by \$4,086.15 in 1919, and by \$24,207.10 in the first five months of 1920. The total deficit incurred in 1918 was \$20,128.46, in 1919, \$49,362.64, and in January and February of 1920, \$10,484.27. Eastern Texas estimated its total deficit for 1920 as \$68,824.68, exclusive of large expenditures necessary for maintenance of way to put the road in safe operating condition. On May 1, 1920, the general balance sheet showed a credit balance of \$32,393.68.

The people of the community objected to the granting of the certificate. They testified to the general conditions of the territory and the prospect

for future increases in tonnage, but they made no definite showing that within any reasonable time there would be sufficient tonnage to pay the operating expenses. To meet these objections Eastern Texas has offered to sell its line to any local interests for \$50,000 (Tr. 30, 31).

On a careful finding of facts made after full hearing, of which all parties had due notice, the commission issued the certificate. After certain recitals with respect to the statute, the application, the notices and publication thereof, the hearing, the finding of facts which is made a part of the certificate, and a certification that "the present public convenience and necessity permit of the abandonment," it is provided (Tr. 32):

It is therefore ordered, That the Eastern Texas Railroad Company be, and it is hereby, authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle, or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled, or removed, or as it is now situated.

Provided, however, That the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed \$50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad.

II.

THE PLEADINGS.

With a copy of the report of the commission and the certificate attached, the petition broadly alleges that the Eastern Texas Railroad Company was incorporated under and by virtue of the laws of the State of Texas and that it and all of its affairs are subject thereto. Emphasis is made of those provisions of the constitution of Texas and of the laws passed in pursuance thereof with respect to railroads which provide "that railway corporations shall receive, transport, and deliver passengers and freight upon payment of the legal fares, rates, or charges," and "such corporations are prohibited under penalty from refusing to do so, or from abandoning the operation of their trains, *or from abandoning their roads or any part thereof*, or failing to resume the operation of their lines when ordered to operate them by the State Railroad Commission" (Tr. 15).

It is further alleged that "these laws prohibit such corporations from abandoning the operation of their trains, and from taking up and removing their main tracks when once constructed and operated; except, as under actual practice, the legislature grants consent, or except under conditions named in the statutes, the Railroad Commission of Texas consents thereto" (Tr. 18).

It is further alleged (Tr. 17) "that the Government of the United States and the Congress, which is its

agency for legislative matters, and the Interstate Commerce Commission, a legislative and administrative agency created by the Congress of the United States, have no judicial authority authorizing them to determine any justiciable question where the rights of the State are involved; that justiciable controversies between the State of Texas and a sovereign State or the United States can only be determined under the Constitution of the United States, particularly under article 3, section 2, and the eleventh amendment to the Constitution of the United States; in the Supreme Court of the United States; and can not be determined before any other court nor before any legislative body or before Congress, nor before any legislative or administrative board or commission, nor before the Interstate Commerce Commission of the United States; that no citizen of the State of Texas, no citizen of any other State, and no corporation of any kind or character can bring an action against the State of Texas, or against those lawfully acting for it as public officers, in any court, nor before the Interstate Commerce Commission of the United States, without the consent of the State of Texas; and that such consent has not been granted by the State of Texas."

It is further alleged that "notwithstanding the aforesaid constitutional provisions, the Interstate Commerce Commission act, as amended by section 402 of the Transportation Act of 1920, was passed in

violation thereof and particularly are subdivisions 18, 19, 20, 21, and 22 of said section 402, being the sections by authority of which the Interstate Commerce Commission acted in granting the order complained of herein, in violation of the Constitution of the United States and particularly of the provisions herein above set out" (Tr. 17).

The paragraphs referred to are alleged to be unconstitutional in that they violate (Tr. 20)

(a) The tenth amendment which reserves to the States and the people all power not granted to the United States nor prohibited to the States.

(b) Subdivision 3, section 8, article 1, which limits the authority of Congress to the regulation of interstate and foreign commerce.

(c) The eleventh amendment, which prohibits suits against the State.

(d) Sections 1 and 2 of article 3, which confer exclusive jurisdiction over justiciable controversies upon the Supreme Court and inferior courts of the United States.

(e) The fifth amendment, which prohibits the taking of property without due process of law.

The motion of the United States to dismiss raise two broad questions:

1. The true interpretation of the law.
2. Its validity under the Constitution.

III.

THE STATUTE.

Paragraphs (18), (19), (20), (21), and (22) (41 Stat. 477), section 402 (41 Stat. 476), transportation act, 1920 (41 Stat. 456), follow *in extenso*.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this act shall apply to all such proceedings. Upon receipt of any application for such certificate the com-

mission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the com-

mission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

(21) The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this act, and to extend its line or lines; *Provided*, That no such authorization or order shall be made unless the commission finds, as to such extension, that it is reasonably required in the interest of such public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this act which refuses or neglects to comply with any order of the commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

IV.

THE HISTORY OF THE TIMES.

As a means of ascertaining the "history of the times" or "the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted," the reports and debates may properly be resorted to. (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; *Standard Oil Co. v. United States*, 221 U. S. 1, 50.)

Senator Cummins, chairman Senate Committee Interstate and Foreign Commerce, on November 10, 1919, laid before the Senate the report of the committee, a copy of which appears as Appendix A. This very able and comprehensive report fully explains the purposes of the act and the conditions, especially that of the railroads, which necessitated its enactment.

Congressman Esch (Wisconsin), on November 11, 1919, in reporting the railroad bill to "the Committee of the Whole House" on the state of the Union for the consideration of bill H. R. 10453, said:

In section 402 we treat of extensions and abandonments. We believe one main cause of the so-called "weak sister" has been the unrestricted right of railroads to be built wherever their projectors thought fit. As a result of this unrestricted right we find in all States of the Union cases where, after a road has been built and long maintained and has gotten its traffic well established, another road puts in a parallel line with the usual result that instead of having one strong road doing the traffic we have two weak roads, as they have to charge the same rate between competitive points, and we burden the public by compelling it to sustain two weak roads when one strong road would have been sufficient.

How does this bill stop that? In this way: Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the shipping interests and producing interests and all other interests that might be involved and then determine whether or not it should issue a certificate of convenience and necessity.

This is not new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin

and other States, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent the construction of some of these short lines which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of "weak sisters," would prevent the creation of any new ones, and would strengthen the existing lines. We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments. We have also provided for abandonments.

Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out to the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones,

affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong. (Com. Rec., vol. 58, pt. 8, 8309, 8316.)

ARGUMENT.

V.

THE INTERPRETATION AND CONSTITUTIONALITY OF THE LAW.

Primarily it is necessary to determine the true interpretation of the portion of the Transportation Act now in controversy, for the State of Texas concedes the validity of the law if its interpretation be accepted, but on the other hand it assails the constitutionality of the law if the Government's interpretation be accepted.

When the bill was filed in the court below the State of Texas evidently accepted the Government's interpretation, for the bill is mainly based upon the challenge to the power of Congress under the Constitution to enact these laws, but in the brief now filed the State of Texas suggests another interpretation of the law, and, as stated, concedes its constitutionality as thus interpreted.

The two positions with respect to the meaning of the law may be thus stated:

The State of Texas claims that the law simply means that when the Interstate Commerce Commission issues a "certificate of necessity" it only authorizes the carrier to abandon *its interstate*

traffic but that it does not authorize the carrier to abandon *its intrastate traffic*, as that question is one to be determined by the authorities of the State in which the railroad is situated or by the State which incorporated the carrier.

We have seen that the primary purpose Congress had in view, in enacting the provisions of law under consideration here, was to eliminate waste of transportation energy, and thus enable carriers to provide and furnish adequate facilities for the transportation of interstate and foreign commerce, and also of intrastate commerce, without imposing an undue burden upon the traveling and shipping public; but, if it be true that the power of Congress under the Constitution is exhausted as soon as it deals with extensions and abandonments as applied to interstate and foreign commerce and before the subject of intrastate commerce is reached, it is apparent that, as a practical matter, the purpose mentioned cannot be accomplished. If the power of Congress to prevent unnecessary extensions and to eliminate the expenditures, which result from the operation of facilities in excess of those required to meet the convenience and necessity of the general public, cannot be made effective, unless the action is concurred in by the authorities of an interested State, that power as a practical matter cannot be effective, because experience of the past has demonstrated that where different tribunals have equal authority over the same subject-matter irreconcilable conflicts are certain to ensue.

In construing these sections it must therefore be obvious that if the construction advanced by the State of Texas be accepted, this portion of the Transportation Act loses its chief efficacy. This is so because of the unified character of the business of transportation for most practical purposes. If the Interstate Commerce Commission only had power to authorize the carrier to abandon its interstate business and was impotent to give like authority to abandon its intra-state commerce, then in most cases the certificate of authority would not be worth the paper it was written on. This must be so, for naturally and almost inevitably a railroad corporation does not abandon its railway, upon which it has expended capital, unless the business has ceased to be profitable and it is clear that if the business be unprofitable, when the railroad has the advantage of revenue from both interstate and intra-state traffic, it would be even more unprofitable if it could only abandon one part of its business. In such event its income would be lessened but its expenses would not be appreciably diminished. The same railroad tracks, tunnels, bridges, terminals, etc., which formerly carried both classes of traffic would still be necessary to carry one class of traffic. Thus the last state of the railroad would be worse than the first, and no case better illustrates the unreasonableness of this construction than the pending case.

Here is a railroad that in recent years has been steadily losing money. Seventy-five per cent of its traffic is interstate and twenty-five per cent intra-

state. For the Interstate Commerce Commission to authorize it to abandon its interstate traffic but without authority to authorize a similar abandonment of intrastate traffic would be about as effective as the permission of the fond mother who permitted her daughter to go out to swim provided she did not go near the water. The Interstate Commerce Commission committed no such folly. It authorized the abandonment of "the operations of all of said lines of railway," not its interstate traffic alone. (*Ante*, p. 5.)

The practical result of any other interpretation would be that the railroad carrier, which could no longer profitably operate its road, could not abandon it without receiving the consent of both the Interstate Commerce Commission and the State Railroad Commission. This would mean the very conflict of authority which the law in question sought to avoid when it explicitly provided as follows:

From and after issuance of such certificate, and not before, the carrier by railroad may, *without securing approval other than such certificate*, comply with the terms and conditions contained in or attached to the issuance of such certificate *and proceed* with the construction, operation, or abandonment covered thereby.

Mark the significant words "*and proceed*." To proceed is to go ahead without further legal requirements. How can it "*proceed*" if it must first make its peace with the State, which may refuse?

Manifestly, the reference to the exclusion of any other authority can not refer to any Federal author-

ity, for this class of transportation problems is not committed to any other Federal agency. It can only refer to the governmental authority of the States. If this be not its meaning it is difficult to say what its meaning could be.

Fortunately, this is not left to mere inference, for the four paragraphs (18 to 22) make it perfectly clear that Congress was legislating with reference to railroad carriers as unified instrumentalities, and that it was not legislating merely with reference to its interstate business. Paragraph (18) begins:

No carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

It will be noted that in this section there is no reference to the interstate or intrastate business of the railroad. The act deals with the unified instrumentalities of commerce, although it is undoubtedly true that the power of the Federal Government over such unified instrumentality is by reason of the fact that the carrier has engaged in interstate commerce and thus has come within the regulatory power of the Federal Government.

Paragraph (19) further manifests the clear purpose to determine the question as an entirety and not as a fragment, for the provision that upon the institution of proceedings "notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, *with the right to be heard* as hereinafter provided with respect to the hearing of complaints or the issuance of securities." This can only mean that if the State has any reason to submit why the railroad in question should not be extended or abandoned that it should have an opportunity to be heard.

Having thus given the State, as it were, its day in court, the act (par. 20) provides that the Commission in issuing the certificate "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." It was evidently intended that the Interstate Commerce Commission should, in granting its certificate, take into account the just

claims of the State. Indeed, the question of public convenience and necessity is left to the Commission when it is provided that it may attach to the certificate such terms and conditions "as the public convenience and necessity may require." Note that the act does not say that the certificate may contain such terms and conditions as the interest of the interstate commerce or even the Federal Government may require; it is the public convenience and necessity, which fairly comprehends the interest of the State and Nation, indeed of the public generally, that the Commission is to consider.

Then follows the significant statement that when the certificate is issued "the carrier by railroad may, *without securing approval other than such certificate*, comply with the terms and conditions contained in or attached to the issuance of such certificate *and proceed* with the construction, operation, or abandonment covered thereby."

What can this mean except the authority to go ahead with the extension or abandonment without consulting any other authority. As previously stated, the words "*may proceed*" are most significant. They mean action and not delay, and were not intended to involve the railroad carrier, which was losing money, in a tangled skein of Federal and State authority.

Moreover, paragraph (20) provides for the power, if this procedure be not followed, of the Commission, or "any commission or regulating body of the State or States affected, or any party in interest," to go into court and enjoin the extension or abandonment of the railroad unless the procedure enacted by

Congress be followed. Then follows the statement that any carrier which does not comply with the requirements of the statute can be criminally prosecuted and fined or imprisoned in the discretion of the court.

Finally, there is one further indication of the purpose of the law - in paragraph (22), when it expressly excepts the abandonment of local transportation facilities like "station, industrial, team, switching or sidetracks, * * * street, suburban, or interurban electric railways."

Under all these circumstances can it be reasonably contended that the Congress simply intended to authorize the abandonment of interstate traffic? I appreciate the disposition of the court, where a question of constitutionality is involved, to accept any *reasonable* construction of the statute which avoids the grave question of constitutionality. But this salutary principle can not be pushed to the extreme of defeating the manifest public policy of the Nation by making almost wholly nugatory the statute, for I again affirm that if the construction of the State of Texas be correct, then the statute is almost valueless, for, as in this case, the carrier, notwithstanding the fact that it now has authority from the Inter-state Commerce Commission to abandon its unprofitable railroad, can not do so without the consent of the State of Texas, and that consent has been withheld. Is it possible that Congress intended that its wise provisions should only end in a blind alley of negation?

VI.

The State of Texas may not seriously claim that the Eastern Texas Railroad should continue operations at a loss.

Passing the fact that the gulf is fast widening between operating revenues and operating expenses, the commission noted that the Eastern Texas estimated that "if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges, and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss" (Tr. 30).

In *Bullock v. Railroad Commission* (254 U. S. 513, 520, 521) the relators sought a prohibition forbidding a State judge of a lower court to confirm a sale of a railroad "for the purpose of and with the privilege on the part of the purchaser of dismantling the same" as authorized by a foreclosure decree. In delivering the opinion Mr. Justice Holmes said:

Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. (*Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396.) No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain. Suppose that a railroad company should find that its road was a failure, it could not make the State a

party to a proceeding for leave to stop, and whether the State would proceed would be for the State to decide. The only remedy of the company would be to stop, and that it would have a right to do without the consent of the State if the facts were as supposed. Purchasers of the road by foreclosure would have the same right.

In *Brooks-Scanlon Co. v. Railroad Commission* (251 U. S. 396, 399), Mr. Justice Holmes, speaking for the court, said:

A carrier can not be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to *Northern Pacific Ry. Co. v. North Dakota* (236 U. S. 585, 595, 599, 600, 604), and *Norfolk & Western Ry. Co. v. West Virginia* (236 U. S. 605, 609, 614). It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss. (*Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 276, 278.) But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an

interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. (*Munn v. Illinois*, 94 U. S. 113, 126.) The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return.

The five paragraphs of the act which are challenged deal with the construction of new lines or extensions and the abandonment of all or any portion of a line, as correlated subjects.

Those paragraphs should also be read in conjunction with section 209, which provides for guaranty to carriers after termination of Federal control (41 Stat. 464); and section 422, amending section 15-A, which authorizes the commission, for two years beginning March 1, 1920, to fix rates on the basis of a "fair return," and directs that it shall take "as such fair return a sum equal to 5½ per centum of such aggregate value * * *" (41 Stat. 488); and section 210 which provides (41 Stat. 468) that "for the purpose of enabling carriers properly to serve the public during the transition period immediately following the termination of Federal control, any such carrier may * * * make application to the commission for a loan from the United States, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the

character and value of the security offered, and the extent to which the *public convenience and necessity will be served.*"

The application shall be accompanied by statements "showing such facts and details as the commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation as the commission may deem pertinent to the inquiry."

Imagine the grotesque spectacle of the Eastern Texas railroad, which was under Federal control during 1918, 1919, and the first two months of 1920 (Tr. 29), filing with the commission an application for a loan showing that it owns 30 miles of railroad located in the unproductive cut-over timber regions of Texas, 1 combination car, and 1 rented locomotive; that its operating expenses are exceeding its operating revenues by about \$5,000 per month and that "if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges, and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss" (Tr. 30).

It is difficult to conceive of a power more wholesome than that which authorized the commission to issue this certificate.

I do not want to stress unduly this feature of the case, of which much was made on the oral argument in the suggestions from the Bench; *for the purpose of the law is as applicable to a profitable as to an unprofitable railroad, and the questions of interpretation and constitutionality are the same with respect to both.*

Suppose, for example, that this road had been profitable, but that its continued operation was a needless drain on the revenues of the interstate carrier, because it could render the same service by another line of track. In such an event, the argument that the restriction of the statute to the interstate business of the carrier can do no harm, because the State could not force the railroad company, as a domestic carrier, to run at a loss, necessarily fails. In either event, there must be a power lodged somewhere to determine whether a useless line of track, even though profitable, may be abandoned in order to end a needless drain on the revenues of a company which is in part an interstate carrier, and therefore a needless drain on interstate commerce and the Government, which is supporting it by its credit and funds.

VII.

THE QUESTION OF CONSTITUTIONALITY.

If Congress may directly or through appropriate agencies condemn defective or inadequate equipment and facilities of interstate carriers irrespective of the nature of the traffic, whether interstate or intrastate, a fortiori, it may authorize a railroad engaged in interstate transportation, which consists mainly of an accumulation of all or many of these things, to cease operations.

This railroad is an instrumentality of interstate commerce, as interstate traffic comprises approximately 75 per cent of the total tonnage (Tr. 30). The power and authority of Congress and its appropriate agencies over it are none the less applicable because of the hopeless financial condition of the company or because it has the dual character of an interstate and intrastate carrier.

The power of Congress or its appropriate agencies over the following functions and activities of interstate carriers, without respect to the distinction between their interstate and intrastate business, is now established:

Wages of pilots (*Cooley v. Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236).

Color blindness, qualification of employees (*Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96).

Hours of service (*Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612).

Safety appliances, automatic couplers (*Johnson v. Southern Pacific Co.*, 196 U. S. 1).

Seamen's wages shall not be paid in advance (*Patterson v. Bark Eudora*, 190 U. S. 169).

Agreements restraining commerce forbidden (*Northern Securities Co. v. United States*, 193 U. S. 197).

Illegal boycotts (*Loewe v. Lawler*, 208 U. S. 274).

Full crews (*Chicago, R. I. & P. Ry. Co. v. Arkansas*, 219 U. S. 453; *St. Louis, I. M. & S. Ry. Co. v. Arkansas*, 240 U. S. 518).

Distribution of equipment, coal cars (*Interstate Commerce Comm. v. Illinois Central, R. Co.*, 215 U. S. 452; *Interstate Commerce Comm. v. Chicago & Alton R. Co.*, 215 U. S. 479).

Pre-cooling and pre-icing of refrigerator cars (*Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 232 U. S. 199, 221).

Joint use of terminals for switching (*Pennsylvania Co. v. United States*, 236 U. S. 351, 373; *Louisville & N. R. Co. v. United States*, 238 U. S. 1).

Pipe lines (*The Pipe Line Cases—Ohio Oil Co. v. United States*, 234 U. S. 548).

Stock yards (*United States v. Union Stock Yard Co.*, 226 U. S. 286).

Books of account and records of all business, including intrastate business (*Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194).

Bills of lading (*United States v. Alaska S. S. Co.*, 253 U. S. 113).

Headlights on locomotives (*Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280).

Running of separate trains instead of mixed freight and passenger trains (*Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 269).

Car doors (*Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43).

Contracts between employee and employer (*Patterson v. Bark Eudora*, 190 U. S. 169; *Robertson v. Baldwin*, 165 U. S. 275; *McLean v. Arkansas*, 211 U. S. 539; *Eric R. Co. v. Williams*, 233 U. S. 685).

Ash pans on locomotives (*Ash Pan Act*, 35 Stat. 476).

Locomotive boilers (*Boiler Inspection Act*, 36 Stat. 913).

Block signals (joint resolution, 34 Stat. 838; urgent deficiencies act, Oct. 22, 1913, 38 Stat. 212).

Live stock shall not be confined in cars for period exceeding 28 hours (*United States v. Baltimore & O. S. W. R. Co.*, 222 U. S. 8).

Employers' liability (*Second Employers' Liability Cases*, 223 U. S. 1).

Tickets (*Commutation Rate Case*, 27 I. C. C. 549).

In all these cases the carrier is treated—as is inevitable—as a *unified* instrumentality.

In *Second Employers' Liability Cases, supra*, this court said:

As is well said in the brief prepared by the late Solicitor General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed ap-

properite to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act." (*Second Employers' Liability Cases*, 223 U. S. 1, 48.)

In *Baltimore & Ohio v. Interstate Commerce Commission* (221 U. S. 612, 619, *supra*) it was held that the hours of service act of March 4, 1907 (34

Stat. 1415, c. 2939), was not to be denied effect because of "the commingling of duties relating to interstate and intrastate operations."

When Congress provided for the abandonment of the railroad "without securing approval other than such certificate" (par. 20), it followed these well-recognized illustrations of the unity of instrumentalities of commerce for many purposes.

VIII.

The Transportation Act.

Here I might profitably rest the argument, for I have shown, by concrete cases, the unity of the instrumentalities of commerce in the exercise of the Federal power to regulate interstate commerce. This case, however, is only one of a number of cases in which the validity of the Transportation Act of 1920 has been challenged in behalf of one or more States. I refer to the Wisconsin Rate Case (in which this court has recently ordered reargument), the New York State Rate Case, the instant case, and the more comprehensive challenge to Federal authority involved in the case which is soon to be argued, namely, the *State of Texas v. The Interstate Commerce Commission and The Railroad Labor Board*. The State of Texas has been foremost in this challenge to the power of the Federal Government, and in the last-named case has filed a bill which challenges nearly every provision of the Transportation Act.

It seems necessary, therefore, that I should meet this challenge now, at least to the extent of indicating the broad lines upon which the constitutionality of the Transportation Act should be defended, for while this case involves only a minor feature of that beneficent law, yet, in principle, it brings into question the many other constructive provisions, which unquestionably have opened up a new chapter in the great volume of the Federal regulation of interstate commerce. I propose, therefore, in this argument, briefly, but inadequately, to vindicate the broad principle upon which the validity of the Transportation Act must rest, and, in so doing, I shall base my argument upon two clauses of the Constitution—(1) the commerce power and (2) the war power.

IX.

The commerce power.

If the commerce power be not broad enough to determine whether an interstate carrier, even though incorporated under the laws of the State, may abandon its business for lack of public patronage as an entirety, and without respect to the division between interstate and intrastate commerce, then it is obvious that our political institutions are not in harmony with the present conditions of human society.

For example, take the concrete case: Here is a railroad running between two points in the State of Texas upon which, as upon nearly every intrastate rail-

road, interstate traffic both originates and terminates. This railroad is something more than a parallel line of steel rails nailed to railroad ties. The living things are the human beings who operate them, and these human beings are permitted to unite in an artificial personality of a corporation; and this corporation, thus constructing and operating the railroad, is an instrumentality of commerce so important and indispensable that, without it, few, if any, railroads would operate. To enable this corporation to carry on its operations it must not only deal with the regulations of our political form of government but must also inevitably take into account the great forces and conditions of commerce. Thus the corporation finds itself subject to regulation not merely by the political state but by the larger organism which we call human society.

It must obtain credit, and, to this end, it must go to the great sources of credit - the banks.

These banks, in loaning their credit and furnishing the necessary means of constructing the railroad, take no account of the legal distinction between interstate and domestic commerce. They loan to the corporation as a unit, and no dollar of the funds which they supply can be allocated by any rule either to interstate or intrastate commerce.

The contractors, engineers, and builders of the road are also unable, in the nature of things, to regulate their operations by any legal distinction between interstate and intrastate commerce. The road that they grade, the ties that they lay, the rails that

they nail down, the tunnels they dig, the terminals they erect, the rolling stock that is constructed are one and all used quite indiscriminately in interstate and domestic commerce and without any legal distinction between them. Mechanically, as financially, the corporation is an indivisible unit.

Then, the road must be operated by labor; and here arises a source of nongovernmental regulation which has meant a tremendous burden upon the transportation companies, for labor is highly organized and the corporation deals with its leaders, and these leaders, in prescribing the conditions upon which engineers, firemen, conductors, and brakemen will operate the roads, take no account of any distinction between interstate and intrastate commerce, but, themselves acting as a unit, they render their services to the corporation as a unit—even as the financier and the contractor have done.

The very act of transportation again illustrates the indivisibility from a practical standpoint and not as a legal abstraction of this indivisible thing that we call commerce, for, whether the transportation be wholly within or beyond the State, it runs upon the same rails, it pierces the same tunnels, it employs the same motive power and rolling stock, and the same train moves for one passenger in intrastate commerce and for another in interstate commerce, but, as stated, its propulsion is due to economic and mechanical forces that have no reference to the legal distinction.

If, therefore, the legal distinction which seeks to make a duality of an essential unity does not

conform to the nature of these economic forces, then it is obvious that our political institutions are not only not in harmony but are lagging behind the economic forces which they are designed to protect and promote.

Fortunately, there is no such rigidity in our political system. Its genius lies in its elasticity and in its adaptability to the ever increasing changes of the most progressive nation in the world. The far-seeing vision of the great Chief Justice realized this in the great case of *McCulloch v. Maryland* (4 Wheat. 316, 415), when he said:

This provision is made in a Constitution intended to endure for ages to come and consequently to be *adapted* to the various crises of human affairs.

In other words, the evolution of the commerce power of the country has been a consistent adaptation of Federal power to the crises, which have been brought about by a mechanical age, which has more profoundly revolutionized human thought and human conditions than any similar change in all the preceding centuries of human existence.

It may be frankly admitted that when the framers of the Constitution provided that "the Congress shall have power to regulate commerce * * * among the several States" they did not have in mind, and in the nature of the case could not have had in mind, the application of this grant of power to the conditions of human society which were about to be profoundly revolutionized. Undoubtedly, they did not intend, as conditions

of society then prevailed, to take from the States the primary regulation of the instrumentalities of commerce. In that day there were very few corporations, and those almost exclusively banking institutions. Indeed, their idea of commerce was largely restricted to sailing vessels which bore merchandise from the port of one State to the port of another State. It was not within their contemplation that it would be applied to the conditions of land travel.¹

A condition in which land travel would be revolutionized by the utilization of steam power was beyond their anticipation, for, when the Constitution was adopted, the only vehicles of commerce outside of the sailing vessel were the horse, the stagecoach, and the wheelbarrow. More than half a century was to elapse before the first railroad should be commenced, and, while at the very time of the constitutional convention a Connecticut Yankee, by the name of Fitch, was experimenting with the steamboat, a full generation was to pass before the prow of the *Clermont* was to divide the waters of the Hudson.

¹ In 1802 the Supreme Court of Connecticut sustained a suit brought against the owner of a stagecoach engaged in transportation between Westfield, in Massachusetts, and Albany, in New York, for carrying passengers within the State of Connecticut in violation of a law of that State, which granted an exclusive right to the plaintiff to engage in such transportation. (*Perrin v. Sikes*, 1 Day (Conn.), 19.)

In Maryland and Virginia also the right to carry passengers had been granted as a monopoly, and it appears that these laws were construed as applying to travel between States. (McMaster's History of the American People, vol. 2, p. 60; *Conf. Conway v. Taylor's Executor*, 1 Black, 603.) Furthermore, as showing the view of this matter in Congress, it is said that a motion was made in the second Congress to permit stagecoaches carrying the mails from State to State to transport passengers also, but that the motion was lost as being in violation of the rights of the States. (McMaster's History of the American People, vol. 2, p. 60.)

The fact is that in those days the primary regulation of commerce, whether interstate or domestic, could, in the nature of the case, only be for the States. Men lived and died without ever leaving the communities in which they were born. Only a few, and those the wealthy, ever crossed the boundary of the State. Each community was sufficient to itself. Human society was then not so highly organized that a man would feel impoverished if the four corners of the world did not pay tribute to his breakfast table. With few exceptions, men lived upon that which was raised within their immediate vicinity, and even that which they themselves developed. It was still the time when Adam delved and Eve span, and the idea that the Congress should regulate their little commercial enterprises, which were almost wholly intrastate and conducted by individuals, not corporations, was to them inconceivable.

What, then, did the Fathers truly intend by this inspired grant of power? It is my belief that their true intention was that the new government which they were creating should have a concurrent *but a paramount power*, and that this paramount power would only be exercised when the regulations of the States resulted in conflicting regulations to the common injury of all. The Federal Government was to be the arbiter, or, shall I say, its function was to be that of the governor in a machine.²

² In *Gibbons v. Ogden*, 9 Wheat. 1, 199, 209, Mr. Chief Justice Marshall said that the commercial power is a whole, incapable of division, and therefore exclusive of a like power in a coordinate sovereignty. The power to tax is an instance of a power which is, in its nature, divisible. "Taxation is

That this was the immediate application of their far-reaching grant of power is indubitably shown by the fact that for nearly one hundred years the Congress did not regulate land transportation by any legislation, excepting only the grants which it made to the transcontinental railroads shortly after the Civil War.

the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. * * * When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. * * * It has been contended by the counsel for the appellant that as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted."

That this was the first view which generally obtained upon this subject appears from the earliest constructions placed upon this clause. In the opinion upon the United States bank bill presented by Edmund Randolph, then Attorney General, to President Washington, on the 12th of February, 1791, in commenting upon the powers of Congress over commerce among the States, Mr. Randolph says that these powers "are little more than to establish the forms of commercial intercourse between the States, and to keep the prohibitions which the Constitution imposes on that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports; preferences to one port over another, by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another." *Prentiss & Egan on the Commerce Clause.*

Even Alexander Hamilton, in his opinion upon the same subject, rendered to Washington 11 days later, while earnestly defending this provision of the Constitution as a substantial and extensive grant of power, nevertheless makes no reference to any consequent limitations upon the authority of the States. *Prentiss & Egan on the Commerce Clause.*

The creation of corporate instrumentalities, the regulation of both intrastate and interstate roads, as well as all other regulations of commerce, were primarily the concern of the States, but at all times subject to the paramount authority of the Federal Government to bring them into harmony, in order to avoid the evils of conflicting regulations which had been the chief reason for the creation of the new Nation. Moreover, in the early days of railroad transportation there were insuperable natural obstacles to the creation of great interstate carriers. Railroads were very primitive affairs—so primitive that for many years after the building of the first railroad it was a subject of earnest and heated discussion among thoughtful men whether the canal or the railroad would be the true method of transportation. Railroads could not then tunnel mountains or cross rivers; of necessity, their operations terminated whenever a natural obstacle was interposed. Thus, between Albany and Buffalo there were, as late as the middle of the nineteenth century, eleven different railroads. The journey to New York was made from Philadelphia to Perth Amboy, when a ship was taken to cross Sandy Hook Bay. The Pennsylvania Railroad ran from Philadelphia to Columbia, and when it finally reached the Allegheny Mountains it necessarily came to a stop, and passengers were taken by a portage road over the Alleghenies and then a new railroad took them to Pittsburgh.

The natural obstacles which thus made for small railroads naturally resulted in their primary and almost exclusive regulation by the States; and the policy of the States was to give almost unrestricted rights of private ownership, for the obvious reason that there was so little faith in the future of American railroads that the States would not contribute out of public funds and the money was contributed by citizens not as a sound financial investment but practically as a public charity. Thus, the subscriptions to the Pennsylvania Railroad were obtained by begging them from house to house, as though it were a hospital and not a necessary instrumentality of commerce.

All this made for the localization of railroads and for unrestricted rights of private ownership, and it is not unnatural that the abuses of such unregulated private ownership led to some of the blackest chapters in the financial history of our Nation.

During all this time a system of legal regulation was in the slow process of development—not by “the Congress,” to which the Constitution had directly intrusted it, but by the judiciary, and notably by this court. In this was no usurpation of power, for this system of regulation by judicial veto was derived from the powers of this court as established in the great case of *Marbury v. Madison*. In other words, the written Constitution would not have been workable if there had not been a balance wheel to keep all the parts in harmonious operation. Thus, the Supreme Court during the full century, when the Congress remained inactive in

regulating interstate commerce, was building up a great and sagacious system of regulation by a series of decisions which determined what the Nation might do and what the States might do. Of necessity, these decisions were a series of great *negations*, for the judicial department of the Government had no power to legislate *affirmatively*. All that it could do was to interpose the negation of its veto when either the Nation invaded the powers of the States or, more commonly, the States invaded the powers of the Nation. The power thus exercised was one of extraordinary difficulty and delicacy. It required this court to proceed with the very greatest caution from concrete case to concrete case lest it be accused by a usurpation of power of violating the very Constitution which it was sworn to defend.³

While nearly all the decisions had the disadvantage of being negations, yet, of necessity, they at times resulted, so far as the declaration of governmental power was concerned, in great and far-reaching affirmations, one of which, said to be "no longer to be regarded as open to re-examination," (*Leisy v. Hardin*, 135 U. S. 100, 118), distinguished between cases in which the power of Congress is, and cases in which it is not, exclusive of any exercise of such power under authority of a State, even in the absence of exercise of the power by Congress; that is to say, a distinction

³ Before the year 1840 the construction of this clause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to 20; in 1870 the number was 30; by 1880 the number had increased to 77; in 1890 it was 148; while at the present time it is probably not less than 500.

between "matters national" and "matters of local interest." (*Gilman v. Philadelphia*, 3 Wall. 713 (Dec., 1865).) Compare statement in *Bowman v. Chicago & Northwestern Ry. Co.* (125 U. S. 465, 483, (March, 1888)), of question as one to be "considered in each case as it arises."

More fully stated the distinction is that the power of Congress is exclusive in matters that are "in their nature national or admit only of one uniform system or plan of regulation." (*Cooley v. Port Wardens*, 12 How. 299, 319 (Dec. T. 1851).)

As to the evils alleged to result from "conflicting regulations of different States," and as to the desirability of "uniformity of regulation," see *Hall v. De Cuir* (95 U. S. 485, (January, 1878)); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (April, 1885); *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (March, 1887); *Bowman v. Chicago & Northwestern Ry. Co.* (125 U. S. 465, 486 (March, 1888)).

Thus, the Supreme Court laid down the distinction in making practicable this concurrent power of State and Nation, that wherever the regulation of commerce was of a local character and referred to a subject matter as to which local laws did not affect the commercial harmony of the Nation that the States could act, subject, however, to the power of Congress, if it saw fit, to abrogate such local regulations, and the corollary to this rule was that whenever the regulation of commerce under consideration was one as to which the public interests required a

uniform rule throughout the Nation then the States had no power to legislate even primarily and the absence of any declaration by Congress was equivalent to an affirmative declaration by that body that no such restrictions should be made.

Thus, the Supreme Court firmly established the rule that for many purposes the power over commerce, whether interstate or intrastate, was concurrent, with the Congress as the paramount authority, and that for many other purposes the States were without authority and the power of the Federal Government was exclusive and supreme, even when the Congress itself had not acted.

This court has always recognized that, as human society became more concentrated and complicated, all powers, Federal and State, have a necessary reaction upon each other. With or without political institutions, steam and electricity have woven the commercial intercourse of the country into substantial unity, and this unity is therefore an indivisible unity. Therefore, it was futile for the political government in solving many practical problems to attempt to make any division. All that the Federal Government could do, as this court wisely declared, was to recognize as a broad principle that whenever the public necessity required that the States should exercise no power whatever, because of its direct and substantial effect upon the current of interstate commerce, the States were powerless, but that in all matters where the effect upon interstate commerce was indirect or insubstantial or where it related to a subject

matter as to which a uniform rule was not required for the common good, the States could legislate as to intrastate commerce, subject to the power of Congress to determine otherwise when in its judgment the interests of interstate commerce required a uniform rule.

While this evolution of the Federal power was in progress great changes were taking place in human society, due to the revolutionary results of the utilization of steam power, electricity, and, later, petroleum. The Nation had ceased to be a congeries of little local unities. It had become inextricably interwoven by steel and copper. The local road no longer sufficed to meet the commercial necessities of the Nation. A vast empire to the west of the Alleghenies had been slowly developed. The Civil War had shown the necessity for great corporate instrumentalities which could build roads, not of a few hundred miles, but of many thousands of miles.

The reaction upon our political institutions was necessarily very profound. The conception of commerce and of its unity became one of which the framers of the Constitution only vaguely dreamed. Slowly it was realized that the prosperity of America depended upon the harvesting machine and the locomotive. The pressure of population in the East, accentuated by the discovery of gold in California, largely delocalized the railroad as a corporate instrumentality. The Government itself entered upon a period of railroad building which has made of America the greatest transportation nation of the world,

and without which its present growth and dominant power in the councils of civilization would have been impossible. It chartered great railroad corporations, granting to one, the Union Pacific, an area in land alone greater than the State of New York and with a financial subvention of \$16,000 per mile upon level ground, of \$32,000 per mile in the hill country, and \$48,000 per mile in the mountains. From 1850 to 1871 the Congress voted to railroads an area of land five times as great as that of the State of Pennsylvania, and thus recognized that America could not grow without a Nation-wide commerce and that the essential instrumentality thereof was a subsidized governmental road.

Unfortunately, the regulation of these roads was still left in private hands, as regulated by State laws, and the Congress awoke all too slowly to the necessity of Federal regulation.

The fact is that our Nation followed very tardily behind England, where the railroads had passed through three stages: First, small localized lines; second, consolidation into larger carriers, and, finally, governmental regulation of the three great systems into which English transportation was divided. In this country the necessity for such consolidation of small units into larger units was far greater than in England, although it progressed much more slowly, but gradually the great transcontinental railroads were created; not, however, without many black chapters in our history. These corporations in many cases became greater than the States which created

them, and their responsible managements exercised an altogether unhealthy power.

Those were the days of the Drews, and Jay Goulds, and the railroad wreckers of that class. The evils of such selfish management became intolerable. By unfair and oppressive methods one man was destroyed and another enriched beyond the dream of avarice. One city waxed great and the other waned. Whole sections—as, for example, the farming interests in the East—found themselves paralyzed as by a creeping paralysis, as freight was hauled from the wheat belt of Dakota to London cheaper than was possible for the farmer who tilled the ground only a few miles from the Atlantic seaboard. It became perfectly obvious that unless the evils of private ownership could be abated these great railroad corporations, which were no longer local, but of nation-wide power and influence, would not only go far to destroy the power of the States, not merely by corruption but by the power which they exercised over the property and prosperity of the citizen, but they would even constitute a serious menace to the Nation itself.

It was at that time that this court rendered the first of its great decisions with respect to the nature of railroad corporations when, in 1877, it decided the Granger Cases and the case of *Munn v. Illinois*. They stripped the railroad of its supposed private character, and stamped it as a semi-governmental instrumentality by holding, to use the legal phrase, that it was “impressed with a public use.” A full century

after the Constitution was adopted Congress, yielding not merely to the so-called granger movement but to the widespread desire of citizens of all classes, passed the first interstate commerce law; and from that time to the passage of the Transportation Act legislation has been a series of advancing steps whereby Congress, in behalf of the whole Nation, seeks to end the abuses of transportation and to regulate the commerce of the Nation.

I do not say interstate commerce alone, for commerce had by this time become, through the development of mechanical power and through the growth of great nation-wide corporations, so indivisible for many purposes that it was impossible to divide it into water-tight compartments. To legislate with reference to interstate commerce without assuming an incidental but necessary control over intrastate commerce, had become impracticable with the progress of human society.

All the concrete cases to which I have already referred in this brief (*ante*, pp. 28-30) show a recognition by this court that while in the mere matter of geography there is still possible a distinction between interstate termini and intrastate termini, yet, in dealing with the instrumentality of commerce, namely, the corporation, and all that it utilizes to make transportation possible, an attempt to allocate any of the functions of any such instrumentality as credit, construction, operation, income, expenditures, to interstate and domestic commerce is a practical impossibility.

It may be that this court has never in one comprehensive phrase thus voiced this incontestible truth. It is the synthetic result of all these decisions. Pursuant to its conservative course, it prefers to decide concrete cases as they arise; but the cases hereinbefore referred to, when considered in the light of the principle which they involve, are based upon the essential unity of the business of transportation, or, at least, the essential unity of the corporate instrumentalities which make such transportation possible. This court has recognized in many cases (*ante* pp. 28-30) as a concrete proposition that Congress has full and plenary power to regulate interstate carriers as instrumentalities of commerce and that this power can not be lessened or hampered or obstructed by the consideration that, of necessity, these interstate carriers are likewise engaged in intrastate business, and that intrastate business is necessarily affected. If the duality of interstate and intrastate commerce be longer a fact, then they are as the Siamese twins, two bodies and yet united by a common ligature. I am not contending for any new doctrine; all I have said is the synthetic result of many decisions of this court in the last half century.

This court has recognized that interstate and intrastate commerce are, for many purposes, so interwoven that their division is impracticable. Thus, in *Baltimore & Ohio Railway Co. v. Interstate Commerce Commission* (221 U. S. 612), this court said (p. 618):

But the argument, undoubtedly, involves the consideration that the interstate and intra-

state operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employees in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.

This consideration, however, lends no support to the contention that the statute is invalid. For there can not be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them.

The most notable expression, however, of the indivisibility of commerce for many practical purposes is that suggested in the *Minnesota Rate cases* (230 U. S. 352), where this court said (pp. 432, 433):

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. *If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to*

their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon.

X.

The concrete question.

The real question, therefore, is whether, with respect to the abandonment of a track, interstate and intrastate commerce are so interwoven that the power over the road as an interstate carrier must exclude the interference of the power of the State over intrastate commerce so far as the extension or abandonment of such line of railway is concerned.

I have already shown that this is the fact in the practical problem before the court. It would be idle for the Eastern Railway Company of Texas to abandon its only source of revenue, if its only authority to do so were limited to one portion of it, for its expenses would not be sensibly diminished by such restriction, and its revenues would be cut down one-fourth.

It was, however, suggested in the oral argument that the power of the State to defeat the purposes of the act by withholding its consent to the abandonment of the intrastate business of a carrier is unim-

portant, in view of the fact that the State could not compel such carrier to continue its operations at a loss.

As already suggested, the answer to this suggestion seems to be that this section is just as applicable to a profitable road as to an unprofitable road. Let us imagine, for example, that the Eastern Railway of Texas was making money on this portion of its tracks, but that the same service could be rendered by another line of tracks at reduced expense to the owner of both. It then desired to abandon one of the two useless lines of tracks, although each was, in itself, profitable. If the interpretation of the State of Texas be correct, then it could not abandon the line of tracks in question as to intrastate traffic without getting the consent of the State, and, as the road was profitable, it could not plead its unprofitable character as a legal defense against the State's claim that it must continue the operation. In such event, the railroad could not abandon the line of track without getting the consent of both the Federal and the State Governments, and it was this evil of conflicting regulations that the act intended to avoid.

How could this truth be more strikingly illustrated than by the instant case? The State of Texas does not challenge the right of the Federal Government to authorize the Eastern Texas Railway Company to abandon its interstate business. It, however, claims that it is for the State of Texas to determine whether the carrier shall abandon its intrastate business.

As a legal abstraction this may be possible, but as a practical problem it is impossible. The laws are made to serve the practical ends of human society. If the railroad can not make enough money to continue its operations, with combined interstate and intrastate fares, quite obviously it can not escape the sheriff's hammer or the bankruptcy court if it have only intrastate traffic as a source of revenue. The facts show that if it is to continue it must have, for the safety of human life, \$200,000 for the improvement of its road. Its net income has shrunk to the vanishing point. Its operations have resulted for three years in a deficit. How, then, will it obtain the necessary money to improve its road, or even to pay its labor? If it gets it from its interstate business or from its business in other States, there is at once created by the veto of the State of Texas upon abandonment a burden and an incapacity in the instrument of interstate commerce, which constitutes a regulation of it by the State in a very substantial sense.

The practical operations of political government must conform to economic laws. The Government is made for man and not man for the Government, and thus there can be no practical regulation of this interstate carrier as a duality. It must either continue its operations as a unit, or it must abandon them as a unit; and the impossibility of dividing the indivisible is thus well illustrated.

I affirm, therefore, that, under the commerce power, the Congress authorized the Interstate Commerce Com-

mission with respect to interstate carriers to extend their roads or to abandon them, as the public necessities of commerce might require; that this or any regulation of an interstate carrier carries with it the power to deal with it as a financial, mechanical, and corporate unit without respect to the fact that its operations are also, in part, intrastate. If it be not so, the Federal Government has not the full power which the framers of the Constitution intended to grant when they said, without reservation: "The Congress shall have power to regulate commerce * * * among the several States." Indeed, if it be not so, the Nation has returned to the period of conflicting commercial relations, which the Constitution was intended to end forever.

XL.

The war power.

This plenary power of regulation not only flows from the commerce clause of the Constitution, but, having in mind the power under which these railroads were taken by the Federal Government, their return to their owners, and the conditions of such return is a legitimate exercise of the war power.

During the World War the Government, under its broad power to make war, took control of all the railroads of the country, *including the Eastern Railroad of Texas*. It did this under an obligation to return those roads in the same good order and condition in which it had taken them, and

it further agreed to compensate the owners of the railroads for the temporary loss of their property. The Government thereupon assumed full power over these railroads' properties to the same force and effect as if they were a branch of the Post Office Department or any other purely governmental instrumentality. They entered into contracts with such owning corporations as were willing to execute them to pay a standard return based upon the average of their net earnings, respectively, during the three years prior; and as to those railroads which refused to enter into such contracts the Government agreed, and under the Constitution was obligated, to pay to the owners of the railroads such fair return as was required by the Constitution when property is taken for a public use.

The Government found the railroads in a deplorable condition. They had been subjected not merely to double but quadruple regulation by governmental and nongovernmental powers. The Government of the United States since 1887 had tried to regulate them by affirmative legislation. The States continued to regulate them so far as this court in enforcing the Constitution permitted them to do so. The great railroad labor organizations regulated the largest part of their expenditures by compelling them to increase wages, until these wages had been increased far more than the entire amount of the net revenues of the railroads in the year before the war. The great banking institutions, which were the sources

of credit, regulated the railroads by prescribing the conditions upon which they could obtain money to build extensions or operate the railroads.

The fact is that the railroads had been regulated almost to their destruction. They no longer controlled either their income, for rates were fixed by both States and Nation, or their outgo, which was determined very largely by the rates of interest which bankers imposed and by the wages which labor organizations demanded.

The whole system, as an efficient transportation system, had broken down. If transportation is the backbone of the Nation that backbone was broken. Many railroads were in the hands of receivers, and many more were headed toward the same graveyard. Everywhere was shortage of cars, equipment, and material.

Shortly before the war, Mr. James J. Hill, the sagacious railroad manager, had estimated that the railroads to be put into first-class condition required \$5,000,000,000, and with these enormous requirements the sources of credit were dried up.

The Government took over the railroads in this shattered condition and proceeded to expend, as a measure of the war, nearly \$1,500,000,000 upon the railroads. At one time, the director general ordered 100,000 cars and 2,000 locomotives. Railroads were consolidated, terminals were shared in common, equipment standardized, and finally, at infinite cost, the American railroads became as important an aux-

iliary in the world's greatest war as the British fleet itself.⁴

The war had ended, and it was obvious that if the railroads were now returned to their owners without adequate protection many of them would immediately be thrown into bankruptcy and the shrinkage of values on \$20,000,000,000 of securities held by private investors would be so immediate and widespread that a panic of colossal proportions would sweep the country. The railroads could not possibly repay to the United States the vast sums which they owed the United States for betterments and withheld revenues, and, on the other hand, the railroads had made vast unliquidated claims against the Government for damages to their roads during the period of governmental operation.

The Transportation Act was passed to meet this difficulty and to avert this crisis. It was passed when the railroads were still under governmental control. If ever there was an emergency this was one, for if the problem could not be solved then there would have been a financial crash which would have done infinite injury to intrastate as well as interstate commerce.

⁴ At one time, in February, 1918, Great Britain, France, and Italy made official representations to our Government that unless food deliveries could be promptly made the war was lost. Our Government made a supreme effort, and within a month supplies had been transported so rapidly that over 6,000 carloads of food congested the docks of the Atlantic liners and were vainly awaiting transportation. The war was won by many contributing causes, and not the least of these was the American railroad, which was utilized as a war power quite as much as the 3,000,000 men who were transported over its pathways of steel to reach the battle line in France.

Let me summarize the situation as condensed from statistics on file with the Interstate Commerce Commission:

1. Net railway operating income is what is left of railway operating revenues after deducting railway operating expenses and taxes, *but before making any allowance for either interest or dividends.*
2. During the test period of three years ending June 30, 1917, the net railway operating income of Class I carriers was \$906,524,492 annually on the average. During the calendar year 1917--the last before Federal control--the net railway operating income for these carriers was \$974,778,937. During the calendar years 1918 and 1919, the net railway operating income for these carriers amounted to \$604,700,630 annually on the average for the two years.
3. During the calendar year 1920 (two months of which were during Federal control and ten months private operation) the net railway operating income amounted to \$62,264,421. The steady decreases in the net railway operating income of Class I carriers, at least prior to 1920, were due not to any decline in gross revenues, which increased each year of the period under review, but solely to the unprecedented increase in railway operating expenses.
4. During the year from March 1, 1920 (the date when the Transportation Act took effect) to February 28, 1921, the first full year of private operation after the roads were returned to their owners, their net

railway operating income amounted to \$2,090,975, a loss from the standard returns of over \$972,000,000.

5. The annual interest (not, of course, including dividends) due on outstanding bonds by these carriers aggregated approximately \$475,000,000.

6. For the year 1916—the year before January 1, 1917, at which date the Government took charge of wage questions under the Adamson Act—the labor costs of these carriers amounted to an aggregate of \$1,468,576,394. From that time until July, 1920, the labor costs of these carriers were from time to time increased by Government action until such labor costs were for the year 1920 \$3,698,216,351, and, if the same scale of wages had been in effect for the entire 12 months of that year instead of only eight, the labor costs would have been \$3,912,992,219—an increase since the Adamson Act of approximately \$2,444,000,000 annually in the labor costs.

7. At the beginning of Federal control approximately 44 per cent of the rolling stock of these carriers was on home lines and subjected to home standards of care. At the end of Federal control 78.1 per cent of this rolling stock was on foreign lines, scattered there by the Government and deprived of home standards of care. The effect of this is shown by the fact that now when a normal quantity of this equipment has been returned to home lines it is found that approximately 374,000 cars are in bad order as against a normal of bad-order cars of not more than 160,000.

8. It is claimed by the railroad carriers that the roadway and track of the railroads were not properly maintained by the Government during Federal control but were returned to the carriers in much worse physical condition than when taken over by the Government. This undermaintenance was claimed to be due to a variety of factors, principal among which were the character of labor available under the pressure of war conditions; inability to secure sufficient supplies of steel, lumber, and other maintenance-of-way material in competition with the war industries; and the impracticability of carrying on normal maintenance work under the grievous pressure of heavy traffic forced upon the railways by the exigencies of the war.

The conditions that called forth the Transportation Act are admirably stated by Senator Cummins, as chairman of the Interstate Commerce Committee of the Senate; and, as I have appended a copy of this report to this brief as an appendix, I need not state with further details what the conditions were that called forth the legislation or what was the motive that caused Congress to pass this beneficent piece of legislation.

It is enough to say that the Government, apart from its power under the commerce clause, owes to these corporate instrumentalities of commerce a direct obligation, due to the fact that they were taken by the Government for public use, and all the obligations that arise under that public use must be met by the power under which they were taken over, the war power.

This power was assumed not merely to carry on the war, but at the present time the Government, because it utilized the railroads to carry on the war, has become a creditor to the extent of many millions of dollars of the corporate instrumentalities which it operated. It has the power, like any other lien creditor, before it releases the property, to which it must look as security for the amounts due it, to see that that property is not sacrificed by undue regulation.

The Government's claim rises higher than that of a mere creditor. Under the Transportation Act it has guaranteed for a period of six months the standard return to the railroads as measured by prewar experience, and it has further directed the commission, in order to rehabilitate the railroads, that it shall authorize rates that will enable the railroads to secure for a period of years an adequate return upon their investment.

The statute is too comprehensive for adequate summary, but its principal provisions are as follows:

This act (1) deals with problems arising out of the termination of Federal control of railroads, including a six months' guaranty of the incomes of railroads and express companies and a provision for the making of new loans by the Government to the railroads; (2) provides for the creation of boards for the adjustment of disputes between railroad employees and the railroads; and (3) amends the interstate commerce act in a number of respects.

Its main purpose was to protect and aid the vital function of transportation and to that end the carriers and to secure the peaceful adjustment of disputes between the railroads and their employees. It made a temporary guaranty of incomes to the railroad and express companies and gave very important directions to the commission for the purpose of better assuring to the railroads adequate revenues, and in some cases more than adequate revenues, thereafter. It facilitated the consolidation of railroads and express companies and the pooling of the earnings or traffic of railroads. It gave directions for the joint use of facilities and the establishment of joint rates. After providing that a railroad might not extend or abandon its line or any portion thereof, or issue securities, without the authorization of the commission, it went further and provided that no other authorization should be necessary: These clauses of the act protected the railroads against unnecessary competition and against the requirement of unnecessary services, regardless of State authorities, and probably regardless of any contracts into which the railroad might have entered. And the act protected the interstate business more fully than theretofore by giving to the commission more complete authority to revise any charge or practice which gives any undue or unreasonable advantage to intrastate transportation as against interstate transportation.

In the labor sections of the Transportation Act Congress sought to secure the adjustment of labor

disputes by negotiation rather than by industrial warfare and by the establishment of a board which should consider the disputes and state its conclusions.

Congress sought to build up the carriers, to harmonize their relations with each other and with their employees, and to discourage useless or unfair competition between carriers or between interstate and intrastate rates.

Observe that Congress made a departure in legislating as to *interstate carriers* instead of simply regulating the interstate transportation of carriers. It dealt with some matters as to interstate carriers which had theretofore been left to the States. This applies not only to the provisions as to extensions, abandonments, and securities and the encouragement of cooperation and consolidation as contrasted with competition, but also to the provisions which apparently direct that carriers be allowed to earn an adequate return from their business as a whole upon their property devoted to transportation as a whole (and not merely an adequate income from their interstate business based upon that portion of their property assignable for purposes of computation to interstate transportation), and it applies to the other provisions which enlarge the power of the commission over intrastate rates and to those provisions which deal with labor disputes. Moreover, Congress authorizes the commission to group railroads and "to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and

which are indispensable to the communities to which they render the service of transportation," although it thereby enables "some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation."

The amendments to the interstate commerce act (secs. 402, 405) which are an essential part of this policy of rehabilitation, provide for orders by the commission requiring the interchange of traffic by carriers and the joint use of terminal facilities; (sec. 402) provide that no railroad company subject to the act may extend its railroad or acquire or operate any line of railroad or extension thereof without securing from the commission a certificate of necessity, and that a railroad subject to the act may abandon all or any portion of its line or the operation thereof upon securing from the commission a certificate that public convenience and necessity permit the abandonment, and that the railroad may extend or abandon operations upon securing the approval of the commission thereto without securing approval other than such certificate; (sec. 407) declare that the commission may authorize carriers to pool earnings or traffic; (sec. 407) authorize the commission to adopt a plan for the consolidation of the railroad companies of the continental United States into a limited number of systems and authorize carriers by railroad to consolidate their properties in harmony with that plan; (sec. 407) authorize the commission to approve the

consolidation of four express companies into one company; (sec. 416) authorize the commission to revise any charge or practice which causes any undue or unreasonable advantage to accrue to persons or localities interested in intrastate transportation as against interstate transportation; (sec. 418) authorize the commission to prescribe reasonable maximum or minimum or maximum and minimum rates for individual or joint transportation and to declare what individual or joint classification, regulation, or practice should be observed thereafter, and to establish joint rates and charges, the act setting forth principles to be observed in fixing joint rates; (sec. 422) direct the commission to so adjust rates as to allow to the railroads a fair return upon the aggregate value of their property as the value of that property shall be determined by the commission, and as that value shall be entitled to consideration for rate-making purposes, the statute fixing temporarily the percentage which shall be considered a fair return and directing that, inasmuch as it is impossible to fix rates which will adequately sustain all the carriers which are indispensable to the communities to which they render service without enabling some carriers to receive a net railway operating income substantially in excess of a fair return upon the value of the property used in the service of transportation, such excess is to be paid to the United States, to be held for two purposes—one-half to be used as a reserve fund for such carrier, and after a certain point has been

reached, the remainder to be usable by the carrier for any lawful purpose, the other half to be held by the commission for a general railroad contingent fund, to be used in making loans to carriers or in purchasing equipment or facilities and leasing the same to carriers; (sec. 439) forbid railroads which are subject to the act to issue securities, even though permitted by the authority creating the carrier corporation, without the authorization of the Interstate Commerce Commission, and allow their issue upon such authorization without the securing of approval from any other source.

XII.

Conclusion.

If, during such period of rehabilitation, the Congress provides that a railroad should not increase its obligations by extending its lines, or, on the other hand, should not lessen the value of the security by abandoning its road, or should not increase the guaranty of the Government by running the road at a loss, why is not such an exercise of power the exercise of the war power and as such an appropriate means to discharge the important duty of rehabilitating the railroads, which suffered such grievous injury during the period of governmental control?

Conceding the power, the means of its execution are in the exclusive discretion of Congress. As Chief Justice Marshall well said, in the great case of *McCulloch v. Maryland* (4 Wheat. 316, 420):

Let the end be legitimate, let it be within the scope of the Constitution, and all mean-

which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.

Alleged contract rights, whether charter obligations or otherwise, are likewise of no avail. (*Knox v. Lee*, 12 Wall, 457, 550, 551; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 567; *Baltimore & Ohio R. Co. v. Interstate Commerce Comm.*, 221 U. S. 612, 619; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 482; *Armour Packing Co. v. United States*, 209 U. S. 56; *Second Employers' Liability Cases*, 223 U. S. 1, 52; *Northern Securities Co. v. United States*, 193 U. S. 197, 350; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 202.)

If Congress has power to provide adequate transportation for interstate commerce and to that end may protect the credit of the carriers by supervising and regulating the issue of their securities and the expenditure of the capital funds, why may it not for the same purpose prevent unwise expenditures for unnecessary extensions and the absorption of their means and the destruction of their credit through the continued operation of unnecessary lines? The power to regulate presupposes the existence of the thing to be regulated and would be void without the power to "foster" and "protect" it. If a State may prevent an abandonment of a line within its borders which is in the opinion of Congress sapping the resources of an instrumentality of commerce, or is reducing its capacity and usefulness, the State

may impair or destroy this instrumentality of interstate commerce and thus destroy interstate commerce itself. If the State can decide a question so substantially affecting interstate commerce, its judgment is substituted for that of the Nation and becomes dominant in the national field of regulation.

I can not leave this important subject without emphasizing a conception of transportation, which has been in recent years largely lost sight of, although in the earlier history of the development of the railroad it profoundly influenced the legislatures of both State and Nation.

Watt's revolutionary discovery of the motive power of steam gave rise to a new social power of immeasurable proportions. The States, sovereign though they are, soon found themselves unable fully to cope with the tremendous power of interstate carriers, and could well understand the surprise of those mediaeval rulers who first organized their lands into feudal holdings as a means of protection, but lived to see the development of great feudal barons, who were stronger than the Crown itself.

Before the Federal Government undertook, a full century after the adoption of the Constitution, the regulation of the interstate railways, the States had realized that the masters of transportation could wield an influence like that of the greatest Warwick or Montfort in feudal times. As long as the railroad carriers, which had far outgrown the territorial boundaries of the States, were left free from Federal regulation, and were thus treated as private instru-

mentalities, the abuses of such unregulated private ownership did constitute a menace to both State and Nation, even though the beneficence of their operations, in developing the American commonwealth, is beyond measurement in words.

As previously stated (*ante*, p. 48), the Supreme Court ended forever this conception of an unregulated private ownership, when it held in *The Granger Cases*, decided in 1877, that the railroads were, in no true sense of the word, private, but were, on the contrary, semi-governmental agencies.

This great declaration by this court in a sense was a new "Declaration of Independence"; for it meant an emancipation from a seemingly all-powerful economic force, which was regulating interstate commerce by enriching one man, city, section, and State and impoverishing another. In this new Declaration of Independence, which was one of the epoch-making decisions of this court, it declared no new doctrine, but simply reverted to the primary conception of the railroad as a public highway.

Since the days of the Roman Empire, the establishment of public highways has been a recognized function of government, and when, therefore, the government—whether Federal or State—grants a franchise to construct a railroad, it simply delegates to the owners of the franchise the privilege, as an instrumentality of the government, to build a public highway. Such public highway does not differ in principle from any turnpike road, ferry, or bridge; and this was recognized in *The Granger Cases, supra*.

Indeed, the railroads could never have been originally built unless they had been vested with governmental powers to take property by the right of eminent domain. Such right can never exist save when it is exercised for a governmental or a semi-governmental purpose. Ordinarily, the right of a man to sell or refuse to sell his property can not be denied him consistently with the spirit of freedom; but when the purpose for which his property is taken by a superior power is for the common good, then his right to retain his property is subordinated to the great purposes of government. He yields it to the common interest subject to his right of just compensation. The construction of the railroads was only made possible by a recognition of the principle that while the duty and function of constructing highways was primarily that of the government, yet, when it delegated such power to a citizen or a corporation, the builders of these improved highways of steel rails were entitled to the right of eminent domain, because they were discharging the function of the government itself.

It is true that the conception of railroads as public highways was, by reason of mechanical necessities, somewhat restricted and differentiated from the ordinary highway in which all men could freely move; but the very principle which compels a carrier to transport and at reasonable rates and without discrimination presupposes the conception that the railroad is not private property, but is a public highway.

This court very early sustained this view in the case of *Bonaparte v. Camden & Amboy R. Co.* (1 Baldwin, 205), in which it held that the former King of Spain could not refuse a passage through his lands to railroad tracks on the ground that this appropriation of his property was not for a public purpose.

If, therefore, the railroads are nothing but improved public highways, and, as such, when operated by private ownership, mere governmental instrumentalities, then it follows that some governmental power must regulate this exercise of a governmental function. Originally, these highways, as previously stated (*ante*, pp. 37-41), were purely local highways; but with the marvellous development of railroad transportation in this country, they became great interstate highways, and, as such, they are predominantly to-day. *Eighty-five per cent of all the transportation business of this country is interstate*, and only 15 per cent is wholly within a State. The railroads of the country are linked together, and are thus as much one system of national highways as the arterial system of the human body is an indivisible unit. A vein may be wholly in the space between the wrist and the elbow; and yet it is so indissolubly a part of the whole circulatory system that, if the veins of the wrist be gashed, the man may bleed to death.

Similarly, the railroad highway may be wholly within a State; but, as in the instant case, it may be so much a part of the entire circulatory system of transportation that 75 per cent of all its business

either flows beyond the borders of Texas or comes into the State from other States.

I had this in mind when, in my oral argument in the *New York Rate Case*, I ventured to say that it was idle longer to attempt to divide the indivisible. Undoubtedly, for purposes of determining whether a citizen is engaged in domestic or in interstate business, a line can be drawn between shipments within a State and shipments beyond the boundaries of a State, for in this case a single act is under consideration, and it is a mere matter of geography to determine whether the merchandise has moved within or without the State. From the angle of the shipper, therefore, the division between interstate and domestic commerce is still applicable; but when the health of the circulatory system of transportation is under consideration, then, as pointed out by Mr. Justice Hughes in the *Minnesota Rate Cases* (*ante*, p. 51), there is such an economic inter-blending that one vein of the arterial system can not be separated from the other veins of the body.

This was true before the Transportation Act was passed; but, as I said in my oral argument in the instant case, that the purpose of the Transportation Act was to regulate, financially and economically, interstate carriers, which of necessity regulated their intrastate operations; that it was necessary, in view of the grave emergency which confronted the Nation, to throw them, in a sense, into hotchpot, so that the strongest would help the weakest, and that all would be rehabilitated by the united strength of all.

aided by the credit, the funds, and the fostering power of the United States Government.

Amplifying my metaphor of the arterial system, the railroads have been and, to some extent, now are, suffering from arteriosclerosis, or a hardening of the arteries. The States are powerless to cure this evil. In fact, their attempts to do so only aggravate the malady. The instant case is a striking proof of this; for the power of the Federal Government to stop the bleeding vein of an unprofitable corporation is halted by the State of Texas, which offers no relief, but opposes only obstruction.

Only the Nation can apply an effectual cure, upon which its economic interests so vitally depend, and it can only do so in the preents emergency by treating the whole body and not a part thereof. If this be not so, the Nation, then, is still confronted by the very evil of conflicting regulations with respect to commerce which brought the Constitution into existence, and which it was supposed that the Constitution had forever ended.

JAMES M. BECK,

Solicitor General.

BLACKBURN ESTERLINE,

Assistant Solicitor General

ROBERT P. REEDER,

Attorney.

NOVEMBER, 1921.

APPENDIX.

GOVERNMENT CONTROL OF RAILROADS.

November 10, 1919.—Ordered to be printed.

Mr. Cummins, from the Committee on Interstate Commerce, submitted the following report [to accompany S. 3288]:

Within a few days after the organization of the Committee on Interstate Commerce for this session, a subcommittee was appointed to consider the hearings which had been heretofore held upon the railway situation with a view of framing a bill and presenting it to the full committee. The subcommittee held almost continuous sessions for many weeks, and on September 2 the chairman of the committee introduced S. 2906 as the result of the work of the subcommittee. It was referred to the full committee and constituted the report of the subcommittee. Since that time, the entire committee has been in session substantially every day, considering S. 2906. The committee concluded its deliberations on October 23, having adopted many amendments; and, thereupon, directed the chairman to introduce a new bill embodying the amendments which had been agreed upon, to have it referred to the Committee on Interstate Commerce, and immediately to report it favorably. This was done, and the present bill, S. 3288, is now on the calendar for disposition by the Senate.

The first thought which the committee desires to impress upon the Senate is the importance of an

early consideration of the measure and the establishment of a reasonably permanent status for our systems of transportation. It is unnecessary to enlarge upon the vital part which transportation plays in all the affairs of the country. The health, commerce, peace, prosperity, and growth of the United States are absolutely dependent upon adequate and constantly increasing facilities for transportation. Everybody understands that the existing condition is a temporary one; and, as we draw near the end of Government operation the demoralizing influences multiply. The conceded return of these properties to their owners, within a short time, necessarily destroys or at least seriously impairs the morale of the operating force and it becomes less and less efficient. A still greater difficulty lies in the fact that no plans can be made for future improvements in the way of additions and betterments, to meet the growing demands of an expanding commerce. Naturally and properly, the Railroad Administration is disinclined to make expenditures of this character involving the execution of a program which, to be effectual, must be consistent and continuous, and the railroad companies are manifestly incapable of either making or carrying out provisions for the enlargement of their facilities for transportation. The result is a practical suspension of work in this direction. There is no practical way in which the period of partial paralysis can be avoided or prevented; but it is obvious, even to the most casual observer, that the period should be shortened by the most diligent attention on the part of Congress. It is to be hoped, therefore, that the moment the German treaty is disposed of the Senate will take up this bill and devote itself, without interruption, to its consideration until

it adopts whatever legislation may seem necessary to meet the very grave situation which confronts the country.

Before entering upon a review of those parts of the bill which relate to future regulation of interstate carriers and which establish a permanent policy with respect to the relation between the Government and our systems of transportation, it may be both interesting and helpful to explain briefly the method adopted by the bill for the return of the railroads to their owners and for the settlement of the accounts between the Railroad Administration and the railway companies.

The bill repeals the act of March 21, 1918, commonly known as the Federal control act, continuing it only in so far as is required to close up all matters growing out of Federal control. The act takes effect at midnight on the last day of the month in which it becomes a law, and at that time the transfer of the properties in the possession of the Government is to occur. All rights and remedies, both of and against the Government, are preserved. Without commenting in detail upon what these rights are, it may be said that it will be many years before all the matters growing out of Federal control will be adjusted, for the disputes already developed are numerous enough to occupy the attention of the courts for a decade. All that this report will attempt to do, in that respect, is to present an estimate of the uncontested condition as it will probably be on the 1st of January, 1920. The estimate has been prepared and furnished to the committee by the financial or accounting department of the Railroad Administration; but, as Mr. Sherley, who compiled it, very well indicates, it is only an estimate, for

many things may happen before the end of the year to affect it, and the reports for a month or two in the past are not completely analyzed.

To understand fully the financial statement about to be made, it is necessary to refer to the Federal control act under which the Director General of Railroads has been operating about 230,000 miles of our 260,000 miles of railways. Whether the President took possession of all the railways under the act of August 29, 1916, at the beginning of the year 1918, is a subject of controversy into which the committee will not enter at this time. It is sufficient to say that the act of March 21, 1918 (Federal control act), authorized the President to relinquish at any time prior to July 1, 1918, "control of all or any part of any railroad or system of transportation." About July 1, the President exercised this power and relinquished a large number of the shorter lines, retaining, as already suggested, something like 230,000 miles which had been from the 1st day of January, 1918, and still are being operated by the Director General of Railroads.

The Federal control act empowered the President to agree with each carrier, whose property was taken over, for the payment of a maximum compensation equivalent to its average annual railway operating income for the three years ending June 30, 1917. Upon this basis the aggregate annual compensation for the use of the railways passing into the hands of the Government and retained until the present time is, in round numbers, \$900,000,000. At various times since the passage of the act the President has entered into contracts with the several railway companies, adopting his maximum authority as the "standard return." With respect to the exact

number of contracts so made, the committee is not advised, but it has information to the effect that while in the main the larger systems are under contract there are yet quite two-thirds of the whole number of carriers whose property is being operated by the Government which have not signed what is known as the "standard contract." These companies may or may not sign in the future; and, if they do not, each of them will be entitled to recover from the Government the just compensation which the law may award. With regard to those carriers, very many in number, which claim that their properties were taken over on January 1, 1918, but which were formally relinquished prior to July 1, 1918, they may or may not be entitled to compensation; and they are mentioned only to say that they are not included in the statement of the existing financial relations between the Government and the transportation systems. The Director General has made contracts with some of these carriers, but the committee assumes such contracts have not been made under the authority to agree upon compensation but are merely traffic agreements of the general character that one common carrier may lawfully make with another.

According to the estimate of the Railroad Administration, the net operating income of the systems in the hands of the Government for the two years 1918 and 1919, will be \$551,777,159 less than the compensation to which the carriers are entitled, computed as provided in the law and as prescribed in the standard contract; that is to say, when all accounts have been adjusted and paid the Government will have lost that amount in its two years of operation. It is the opinion of the committee, without reflecting in

any wise upon the Railroad Administration, that in the end the loss will be found to be much greater than the estimate submitted; but, however that may be, it must ultimately be paid from the Treasury of the United States.

As is well known, Congress has appropriated, in all, \$1,250,000,000 for the use of the Railroad Administration. This sum, so far as the committee is advised, has been expended, or will be expended, for the purposes and under the conditions prescribed in the Federal control act.

Assuming that the Government's loss for the two years will be, in round numbers, \$600,000,000, it is obvious that if the railways could pay on December 31 all that they owe the Government, \$650,000,000 of the appropriation would be returned to the Treasury; but that will not be the situation, for it is entirely impossible for the railways to repay out of income the sums which have been advanced by the Government for additions and betterments—expenditures which are ordinarily charged to capital account. It will become necessary for the Government to pay the railways a large part of the compensation in order that the carriers may pay the interest upon their bonds and other fixed charges and make such distribution in the way of dividends as will prevent undue hardship among their stockholders. If the Government retains about \$400,000,000 and applies that sum upon the amount due from the railways on account of additions and betterments, the Government would still carry about \$525,000,000 of the additions and betterments. If, however, it shall carry for future payment all expenditures during the two years for additions and betterments, it must fund nearly \$950,000,000 on that account

alone. If it is also to carry the amount of cash in the hands of carriers on January 1, 1918, taken over by the Government, and the balances in the hands of agents, the amount to be funded would be increased \$383,000,000; making a total substantially of \$1,300,000,000.

The bill before the Senate pursues a middle course with respect to funding the indebtedness due from the carriers to the Government which is thought to be just both to the public and the railways. Nearly three weeks ago the committee asked the Railroad Administration to furnish a statement applying the provisions of the bill to the settlement of accounts and showing just what the result would be; but, up to this time, the statement has not been received. As soon as it comes in, it will be laid before the Senate.

October 22 the Railroad Administration, through the Director of the Division of Finance, sent to the chairman of the committee a letter which presents the basis of the general conclusions above stated, and it is thought but fair to the committee, and to the administration as well, that it be published as a part of this report. It is as follows:

UNITED STATES RAILROAD
ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
Washington, October 22, 1919.

Hon. A. B. CUMMINS,

United States Senate, Washington, D. C.

MY DEAR SENATOR CUMMINS: Pursuant to my promise of some time ago, and with apology for the necessary delay, I beg to give you below a statement showing, on the basis of the best estimate that we can make at this time, an approximation of the

amount that would be needed to defray operating deficit, the amount that the Railroad Administration will have temporarily tied up in various assets and the additional amount that will be required in order to aid in the liquidation of the affairs of the Railroad Administration.

You understand, of course, that the figures are necessarily tentative because the latest balance sheet of the Railroad Administration is for June 30, 1919, and necessarily the most careful estimates can not possibly disclose the precise facts as they would develop during the last six months, approximately one-half of which is still in the future.

The figures given are upon the assumption that disposition will be made in accordance with the terms of the standard contract. The other possible disposition suggested in amendments proposed to provide for funding a certain amount of the indebtedness of the railroads would naturally present the matter in a different aspect. I shall consider that further on.

In order to enable settlements with the railroad companies at December 31, 1919, it will necessitate the payment to them of approximately \$326,541,893, arrived at as per the following table:

<i>Amounts with the corporations immediately payable at December 31, 1919.</i>	
Due the Government:	
Demand loans.....	\$53,078,186
Short term notes.....	75,553,167
Open account balances due Government, \$220,053,510	
Less amount not now collectible.....	66,028,228
	154,025,282
For additions and betterments, other than allocated equipment, financed from income.....	370,381,494
Allocated equipment financed under general equipment plan.....	200,000,000
For additions and betterments financed through open account due company.....	45,100,152
Total immediately payable to Government.....	\$98,138,261

Due the corporations:

Balance due on compensation.....	\$856,395.84
Depreciation and retirements.....	304,179.28
Open account balances due corporations.....	65,405.22
 Total immediately payable to corporations.....	1,224,680.34
 Amount needed to be appropriated to enable the Railroad Administration to immediately pay to the corporations the net amount due them.....	326,541.86

When the Railroad Administration shall have made settlement with the railroad companies in accordance with the foregoing, the situation will be as follows: The Railroad Administration will have expended and there will, in consequence, have been correspondingly consumed or tied up

1. Amount necessary to defray operating deficit, the differ- ence between the standard rental payable to the rail- road companies and the estimated net operating income for the 23 months ended Dec. 31, 1919.....	854,777.49
2. Amount of cash working capital necessary to leave tempo- rarily with the corporations until the returns from the operation of their properties after Federal control become available.....	337,943.27
3. Amount of open account due Government by the cor- porations, representing payments by Government of corporate liabilities which the corporations can not repay at this time.....	63,628.28
4. Amount of additions and betterments' expenditures, including equipment, made to the railroad companies' properties during 1918 and 1919, which must be carried by the Railroad Administration for the time being.....	518,675.30
5. Improvements on inland waterways.....	14,311.88
6. Loans during 1918 and 1919 to railroad companies not immediately repayable.....	18,375.73
7. Boston & Maine reorganization.....	20,000.00
 Total.....	1,576,541.89

Appropriations heretofore made and applicable to the foregoing aggregate \$1,250,000,000, so that to discharge its obligations as they exist at December 31, 1919, on the basis of the standard contract, the Railroad Administration will need an additional ap-
propriation, it is estimated at this time, of \$326,541.
893.

Concerning the proposal to fund the indebtedness of the railroad companies to the Railroad Administration, it will be noted from the foregoing that a settlement under the contract contemplates that there will have been retained in settlement with the companies, on account of additions and betterments to their properties, the sum of \$415,481,626 and that it is contemplated that even with that deduction from the compensation that the Government, nevertheless, will be carrying \$518,075,309 of additions and betterments which the companies are not able to repay at this time, so that if the whole amount of the indebtedness for additions and betterments should be funded the above appropriation would have to be increased by the amount of \$415,481,626 and the Government would then be required to fund for additions and betterments the sum of \$933,556,935.

Regarding the proposal of the corporations that the amount of the working capital taken over should also be funded, it is to be observed that at the beginning of Federal control the amount of cash in the hands of the treasurers, so taken over by the Railroad Administration, aggregated \$239,190,605. In addition, the balances in the hands of agents and conductors aggregated \$143,899,424.

If the proposal looks to the furnishing of these amounts in addition to amounts sufficient to pay off the liabilities of the Railroad Administration, that amount would have to be added to the requirements shown above. However, the fact is that the Railroad Administration used such cash and agents' and conductors' balances in liquidating the liabilities of the corporations in the earlier months of Federal control and it is to be assumed that a like process will take place at the end of Federal control.

If, therefore, the Railroad Administration leaves in the hands of the corporations a sufficient amount of working assets to liquidate its liabilities, not all of which must be paid simultaneously with the end of Federal control but which will be liquidated doubtless

spreading over a period of from 30 to 90 days (it is true that a considerable part of such liabilities must be met in the first 15 days following the return of the roads to private control and a sufficient amount of cash or other quick assets should be left with the corporations to protect them) it would be ample protection to the corporations in point of working capital and would practically duplicate the situation as it developed when Federal control intervened.

As stated above, the Railroad Administration used the cash assets of the corporations, generally, for the payment of the corporations' liabilities. To the extent that there is a balance in the hands of the Railroad Administration, resulting from such transactions, the statement showing the account with the companies on page 2 of this letter, contemplates that such amount will be paid over to the companies except to the extent that any such amounts may be properly applied to the repayment of the indebtedness of the companies to the Railroad Administration.

To the extent that such process resulted in the Railroad Administration paying corporate liabilities in excess of assets, the account on page 2 of this letter contemplates, moreover, the collection thereof from the corporations only in cases where it is practicable for such corporations to make payment thereof from balances of compensation due them.

On this theory, the foregoing indicates that the Government will be required to carry, for the time being, balances due from the corporations on open account aggregating \$66,000,000.

With reference to the amount shown above for working capital temporarily tied up, it should be observed that a considerable part of the assets of the Railroad Administration are represented by items other than cash. For example: traffic balances, accounts receivable and various unadjusted items, both debit and credit, that are necessarily incident to a business of such magnitude and which can not finally be cleared up short of several months. The

amount shown represents the balance between such unsettled assets and unsettled liabilities—the net being the figure which is shown as the amount which the Government will temporarily have tied up as working capital.

If for any cause the plan for a general equipment trust should not be carried out, there will be needed a sum greater than has been set up. How much, it is now impossible to foretell. The general equipment trust plan contemplates a repayment to the Government of at least \$200,000,000, which figure has been used in the foregoing statements. In the absence of a general equipment trust plan, some moneys could be immediately secured through equipment trusts of individual carriers. Perhaps something like \$100,000,000 could be obtained in this regard. So that the figure given above, \$326,541,893, might need to be increased by \$100,000,000.

I think it is desirable that I again emphasize the fact that this statement, though made from a somewhat detailed examination of accounts with the respective carriers, of necessity can not be considered as final. The need to forecast events more than two months away of itself introduces elements unstable enough to make conclusions necessarily tentative only.

In addition to that, it should be stated that there are various matters that will only reach adjustment and a status sufficient to enable them to be stated in financial terms after presentation and determination of claims respectively by the Government and the railroads touching many items incident to Federal control. So that in particular the item set out in the foregoing statement under the designation of "Amount necessary to defray operating deficit, etc., " must be considered as subject to considerable change in amount because of the subsequent bringing into it of debits and credits which can not now be even approximated. I am sure that you will appreciate these facts, and I emphasize them simply

that a cursory statement of the figures therein submitted may not lead others to erroneous conclusions.

Very truly yours,

SWAGAR SHERLEY,
Director Division of Finance,

(The statement applying the provisions of the bill to the settlement of accounts and showing just what the result would be, heretofore referred to as not having been submitted, was subsequently furnished and is here printed in full, as follows:)

UNITED STATES RAILROAD ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,

DIVISION OF FINANCE,
Washington, November 10, 1909.

Swagar Sherley, director; Charles B. Eddy, associate director.

MY DEAR SENATOR CAMPBELL:

I am inclosing you herewith the following statements:

Statement A, which purports to show the amount of capital expenditures (exclusive of the cost of allocated equipment) and other indebtednesses, that would be funded under the terms of Senate Bill 3288.

Statement B, which purports to show the amount of capital expenditures (exclusive of allocated equipment) and other indebtednesses, that would be funded under the terms of the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract.

NOTE. In order that Statement B may be better understood, the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract is printed as an appendix to this report.

Statement C, which purports to show the amount of capital expenditures (exclusive of the cost of allo-

cated equipment) and other indebtednesses, that would be funded under the terms of H. R. 10453 (the Esch bill).

Statement D, which purports to show the amount of capital expenditures on account of equipment purchased for the railroads and allocated to them, that is expected will be funded under the national equipment trust plan.

Statement E, which purports to show, in comparative columns, the effect of the refunding provisions in Senate Bill 3288 (the Cummins bill), H. R. 10453 (the Esch bill), and amendment suggested by the Division of Finance of the Railroad Administration permitting off-set in accordance with the standard contract; the statement also shows the amount of moneys which will need to be voted by Congress in order to carry out any one of these plans.

The financial differences shown on these tables between the funding provisions in the House bill and those in the Senate bill are due to the fact that the House bill requires deductions to be made first against indebtednesses other than that which grows out of expenditures chargeable to capital account, whereas the table touching results of the provisions in the Senate bill are, as noted, predicated upon deductions of amounts due on capital account first, and only subsequently upon deductions on account of other indebtedness.

I trust that these will give you the information you desire. To the extent that these figures differ from those in my letter to you of October 22, 1919, it should be stated in explanation that it is due chiefly to the fact that the estimate then hurriedly made had to be the result, in a large measure, of treating as a whole the accounts of the various railroads, whereas the present statement is the result of an elaborate detailed study of the accounts of each of the Class I roads. It should be borne in mind, however, in connection with these statements, as in connection with the previous one, that a large part of the tables submitted are necessarily estimates, as they forecast

conditions to the end of the year and are predicated, even as to recent past months, upon estimates rather than upon the actual figures, which are not yet obtainable. They are, however, I believe, substantially accurate.

I regret that the intricacy of the problem, together with the illness of Mr. Parker, has delayed several days the supplying you with this information. I beg to remain,

Most sincerely,

SWAGAR SHERLEY,

Director Division of Finance.

Hon. A. B. CUMMINS,

United States Senate, Washington, D. C.

STATEMENT A.—Amount of original expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies, that would be funded under the terms of S. 36.

Total cost of additions and betterments which could be funded, exclusive of allocated equipment.	\$1,131,400
Amount which may be deducted therefrom, being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges and regular dividends and working capital to the extent that money due permits of it.	221,823.00
Amount of capital expenditures, other than allocated equipment, fundable under terms of bill.	731,728.00
Other indebtedness to be represented by demand notes.	211,881.00
Long-term loans (N. Y., N. H. & H. R. R. and Boston & Maine)	68,275.00
Total indebtedness representing amounts funded and also amounts subject to payment on demand under the terms of the bill (exclusive of allocated equipment).	831,987.00

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against capital expenditures rather than against indebtedness due on open account.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the roads as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

NOTE 3.—This statement presumes the payment to the railroads of sums over and beyond their need for fixed charges and regular dividends of \$321,815,000, as available for working capital. The estimated amount that would be needed by the railroads as working capital, if each road were given working capital on the basis of one month's operating expenses, would be approximately \$353,000,000. The provisions of the bill provide, however, not that the roads shall be furnished with working capital, but only that deductions shall not be made from the sums to be funded unless working capital shall have been provided. The credits due the various railroads out of compensation and otherwise, after paying fixed charges, when worked out for the various roads, do not permit of additional payments in a sum greater than \$321,815,000, which, therefore, is the amount of working capital that the roads would receive after compliance with the terms of the bill. This means that some roads would get a sum equal to a full month's operating expenses as working capital, whereas some roads would not receive any working capital under this plan, and this latter class would be those roads most in need of working capital.

STATEMENT B.—Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies that would be funded under the terms of the section submitted by the Division of Finance of the Railroad Administration, permitting offsets in accordance with the provisions of the standard contract.

Total cost of additions and betterments which could be funded, exclusive of allocated equipment	8775,551,000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges and regular dividends).....	415,016,000
Amount of capital expenditures, other than allocated equipment, fundable as permitted under the standard contract, long-term loans (N. Y., N. H. & H. R. R. and Boston & Maine).....	360,535,000
Other indebtedness, etc.....	68,375,000
Total amounts to be funded (exclusive of allocated equipment).....	587,556,000

It is to be noted that under the terms of the standard contract, in addition to the amount of \$360,535,000 to be funded, there would be indebtedness of the railroads to the Government to be evidenced by demand notes of the sum of \$158,646,000, indebtedness on account of long-term loans to the New York, New Haven & Hartford Railroad and the Boston & Maine Railroad and other companies of \$68,375,000; or a total of funded and demand indebtedness of \$587,556,000.

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against capital expenditure rather than against indebtedness due on open account.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

STATEMENT C.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies, that would be funded under the terms of H. R. 10453.*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment	8775,551,00
Amount which may be deducted therefrom, being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges, regular dividends, and working capital to the extent that money due permits of the same	133,911,00
Amount of capital expenditures, other than allocated equipment, fundable as permitted under the standard contract	641,640,00
Long-term loans, including New York, New Haven & Hartford, and Boston & Maine	68,375,00
Other indebtedness, etc.	69,876,00
Total amounts to be funded, exclusive of allocated equipment	779,891,00

It is to be noted that under the terms of H. R. 10453, in addition to the amount of \$641,640,000 to be funded, there would be indebtedness of the railroads to the Government to be evidenced by demand notes of the sum of \$69,876,000; indebtedness on

account of long-term loans to the New York, New Haven & Hartford Railroad and Boston & Maine, and other companies, of \$68,375,000; or a total of funded and demand indebtedness of \$779,891,000.

NOTE 1. This table is built on the assumption that sums deductible from compensation and open account are applied, first, against indebtedness due on open account, rather than against capital expenditures.

NOTE 2. It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

NOTE 3. This statement presumes the payment to the railroads of sums over and beyond their need for fixed charges and regular dividends of \$279,000,000, as available for working capital. The estimated amount that would be needed by the railroads as working capital, if each road were given working capital on the basis of one month's operating expenses, would be approximately \$353,000,000. The provisions of the bill provide, however, not that the roads shall be furnished with working capital, but only that deductions shall not be made from the sums to be funded unless working capital shall have been provided. The credits due the various railroads out of compensation and otherwise, after paying fixed charges, when worked out for the various roads do not permit of additional payments in a sum greater than \$279,000,000. This, therefore, is the amount of working capital that the roads would receive after compliance with the terms of the bill, which means that some roads would get a sum equal to a full month's operating expenses as working capital, whereas some roads would not receive any working capital under this plan, and this latter class would be those roads most in need of working capital.

STATEMENT D. Amount of capital expenditures on account of equipment purchased for the railroads and allocated to them that it is expected will be funded under the national equipment trust plan.

Total cost of 100,000 cars and 1,930 locomotives	8,322,000,000
Cash to be received through the sale of equipment trust certificates to the public	200,000,000
Amount to be represented by equipment obligations held by the Government, secondary to those in the hands of the public, and to be payable in 15 installments	172,000,000

NOTE 1. This table is predicated upon the carrying out of the national equipment-trust plan, and represents what is believed to be a conservative statement as to the amount of cash immediately available from such plan. It is impossible at this time to state more definitely the amount to be carried of the cost of this equipment, due to the fact that something under 10 per cent of the cars purchased have not yet been finally accepted by the railroads.

NOTE 2. If the national equipment-trust plan should not be carried through, and separate equipment trusts should be created for the financing of the obligations of the respective roads, it is likely that the Government would realize immediately in cash about \$100,000,000 instead of \$200,000,000, and correspondingly carry over a 15-year period some \$272,000,000 rather than \$172,000,000, in which event the moneys needed to be appropriated, as set out in Table E, would have to be increased by approximately \$100,000,000.

STATEMENT E.—*Comparison of amounts to be funded.*

(1) Under the provisions of Senate bill No. 3288. (2) Under the provisions of H. R. 19153. (3) Under the provisions of the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract.]

Class I roads	Senate bill No. 3288.	H. R. 19153.	Standard contract.
1 Total cost of addition and betterments (excluding allocated equipment)	\$775,551,000	\$775,551,000	\$775,551,000
2 Amount that may be deducted therefrom as cost compensation or open account due to company	233,823,000	133,911,000	415,016,000
3 Net amount of addition and betterments (excluding allocated equipment) to be funded	541,728,000	641,640,000	360,535,000
4 Open account due to company, to be evidenced by demand notes	158,884,000	16,876,000	195,616,000
Long term loans on Indiana, N. Y., N. H. & L., R. R. and Boston & Maine	68,375,000	68,375,000	68,375,000
GRAND TOTALS			
Additions and betterments and open account due to Government, to be funded	53,000,000	53,000,000	53,000,000
Total amount of funded and demand indebtedness (exclusion of allocated equipment)	831,987,000	779,801,000	587,556,000
OTHER REQUIREMENTS			
Allocated equipment not covered by equipment trust	172,315,000	172,315,000	172,315,000
Additions and betterments inland waterways	11,312,000	11,312,000	11,312,000
Operating less 24 months all properties (note 2)	646,777,000	646,777,000	646,777,000
Total requirements	1,603,534,000	1,613,355,000	1,613,691,000
Appropriations already made	1,250,000,000	1,250,000,000	1,250,000,000
Appropriations now required (note 1)	415,431,000	363,355,000	171,691,000

NOTE 1.—The foregoing estimate is predicated upon the conversion into cash of all assets of the Railroad Administration, other than those shown above as being carried. In point of fact, in dealing with figures as large as these and matters as complicated, it will necessarily follow that there will be a considerable amount of assets of the Government subsequently convertible into cash that can not be immediately realized, or even realized contemporaneously with the need of paying out on account of liabilities of the Government.

It is safe to estimate that this amount will be at least \$200,000,000, so that, practically, to carry out the requirements under the Senate or House bill, or the substitute proposal in accordance with the existing standard contract, the Congress should appro-

priate a sum at least \$200,000,000 in excess of that stated in item 13.

Note 2.—The operating loss shown above represents an estimate for the two years of Federal control of the amount by which the net operating income of the railroads fell short of the standard return, estimated amount of interest on accounts due from the Government to the railroad companies, and on accounts due from the railroad companies to the Government; and is predicated on the present basis of earnings, the latest available figures on an actual basis being for the month of August, 1919, so that for the last four months the figures are necessarily speculative.

The operating loss also includes an estimate of \$95,000,000 on account of adjustment of materials and supplies, under provisions of the standard contract. It should be added that beyond these things there are various matters that will reach adjustment and a status sufficient to enable them to be stated in money only after presentation and determination of claims, respectively, by the Government and the railroads, touching many items incident to Federal control; so that in particular the item of operating loss must be considered as subject to considerable change in amount because of the subsequent bringing into it of debits and credits which can not now even be approximated.

APPENDIX.

The proposition submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract is as follows:

Any indebtedness of any carrier to the United States incurred for additions and betterments to roadway and structures, or betterments to equipment, made during Federal control and properly chargeable to capital account, which may exist at

the time Federal control is relinquished, and after applying against it such indebtedness of the United States to such carrier as is permitted under any contract now or hereafter made between such carrier and the United States, or, where no such contract exists, as would be permitted by the terms of the standard contract between the United States and the carriers relative to deductions from compensation (see, 7, par. b, of the standard contract), shall be payable, at the request of the carrier, in 10 equal, annual installments, the first one at the expiration of one year after the termination of Federal control, and one at the end of each year thereafter until all are paid, with interest at the rate of 6 per cent per annum, payable semiannually: *Provided, however,* That any carrier obtaining the funding of such indebtedness as aforesaid shall give, in the discretion of the President, such security in such form and upon such terms as he may prescribe, to insure the faithful and punctual payment by it of the principal and interest under the funding arrangement herein above permitted. Any other indebtedness of any such carrier to the United States which may exist after the settlement of accounts between the United States and the carrier shall be evidenced by notes payable on demand, with interest at the rate of 6 per cent per annum, and secured by such collateral as the President may deem it advisable to require.

With respect to any bonds, notes, or other securities acquired under the provisions of this section or under the provisions of said act of March 21, 1918, the President shall have the right to make such arrangements for extension of the time of payment or for the exchange of any of them for other securities, or partly for cash and partly for securities, as may be provided for in any agreement entered into by him or as may in his judgment seem desirable.

The President shall have the right, at all reasonable times until the affairs of Federal control have been concluded, to inspect the property and records of all

carriers at any time under Federal control, whenever necessary or proper to protect the interests of the United States, or to supervise matters being handled for the United States by agents of the carriers, or to secure information concerning matters arising during Federal control, and the said carriers shall provide all reasonable facilities therefor.

Said carriers shall, upon the request of the President or those duly authorized by him, furnish all necessary and proper information and reports compiled from the records made or kept during the period of Federal control affecting their respective lines.

All powers invested in the President by this act, except those contained in section 7, may be executed by him through such officers, agents, or agencies as he may from time to time appoint.

All unexpended balances of money heretofore appropriated in the said act of March 21, 1918, or in the act of June 30, 1919, entitled "An act to supply a deficiency in the appropriation for carrying out the act entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918," are hereby reappropriated and made available until expended in the manner authorized in the said act of March 21, 1918, for the purpose therein and herein specified and of adjusting, settling, liquidating, and winding up all matters of whatsoever nature, including compensation, arising out of or incident to Federal control, and all moneys derived from the operation of the carriers, or otherwise arising out of Federal control, and all moneys that have been or may be received in payment of indebtedness of any carrier to the United States arising out of Federal control shall be and remain available until expended for the purposes aforesaid.

THE POLICY ESTABLISHED BY THE BILL FOR FUTURE
CONTROL AND REGULATION.

Having made clear, as it is hoped, the terms upon which the railways are to be returned to their owners for private operation under public control and regulation, the committee advances to those parts of the bill which create the permanent system for such control and regulation. In considering this phase of the subject, it should be constantly borne in mind that if our policy is to be private operation of the instrumentalities of transportation there must be a large and constant inflow of capital. As commerce increases in volume, the facilities of transportation must increase; and, without reckoning the funds which must be secured to discharge maturing obligations already in existence, it will be conceded by everybody that immense sums will be required from year to year for new construction, additional equipment, and necessary improvement. The capital thus demanded must be drawn from those who have money to invest, and, of course, it must be voluntarily contributed. If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field. The better the security and the more certain the return, the less will be the rate required to attract the investment.

It is here that our present system of regulation has failed. Taking the railways as they are, with their widely varying conditions, both of construction and environment, it is wholly impossible for the Interstate Commerce Commission, no matter how wise and faithful its members may be, to prescribe schedules of charges for transportation that will be, at the same time, just to the public and that will maintain the railways which must continue to function if the people of the country are to be provided with adequate transportation. In a given competitive area the rates which will furnish one company a grossly excessive income will lead another into bankruptcy. The writer of this report is firmly convinced that when the Government assumed the operation of the railways they were taken as a whole, earning all they should be permitted to earn; but, in the inevitable distribution of these earnings among the various railway companies, the railways which carried 30 per cent of the traffic were earning so little that they could not, by any economy or good management, sustain themselves. Nevertheless, it is unthinkable that these highways of commerce shall be abandoned, and some system must be devised not only for their continuance but for their betterment and growth. Government ownership would solve the problem, but it is the judgment of the committee that Government operation is attended with so many disadvantages—notably in the increased cost of operation—that this plan must be discarded. There is but one other solution. It is consolidation, and here two policies at once present themselves. The first, complete consolidation into one ownership; second, consolidation into comparatively few com-

petitive systems. The first has some advantages over the second, but it has some disadvantages, and the disadvantages outweigh, in the opinion of the committee, the advantages.

The superior efficiency of several systems need not be enumerated at length, but there is one consideration to which attention should be called: Competition, not in rates or charges but in service, will do more to strengthen and make public regulation successful than any other element which can be introduced into the business of transportation. Honorable rivalry among men is the most powerful stimulus known to human effort. For this reason, largely, the committee, recognizing the necessity for consolidation, determined in favor of the gradual unification of the railways into not less than 20 nor more than 35 systems; not regional or zone systems but systems that will preserve substantially existing channels of commerce and full competition in service. In the grouping of the railways into these systems another vital rule is to be observed, namely, that they are to be so divided that the operating incomes of the several consolidated companies will bear substantially the same relation to the value of their respective properties held for and used in transportation.

The procedure for bringing about the proposed consolidation may now be considered. The bill creates a transportation board, with large duties and powers, which will be more fully explained hereafter. It is mentioned now only because it is the governmental agency through which consolidation is to take place. Section 9 declares the policy of consolidation; prescribing that, as soon as practicable and in the manner provided for in the act, the railways of the

continental United States shall be divided in ownership and for operation into not less than 20 nor more than 35 separate and distinct systems, each of said systems to be owned and operated by a distinct corporation organized or reorganized under the act. Section 9 concludes:

In the aforesaid division of the said railways into such systems, competition shall be preserved as fully as possible, and wherever practicable the existing routes and channels of trade and commerce shall be maintained. The several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the value of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of the railway properties involved in the comparison.

Especial attention is directed to the sentence last quoted, for it expresses the object to be attained; and until it is attained rate regulation can not be fully equitable to both the public and the carriers.

Immediately upon its organization, the transportation board is to prepare and adopt a tentative plan for consolidation. The plan is to be submitted to a public hearing, at which it is assumed that all persons in interest will appear. After the hearings are concluded, a final plan is to be adopted and submitted to the Interstate Commerce Commission for its approval. This arrangement will make known to the whole country the consolidations which must eventually occur. Section 12 presents the authority for the reorganization of existing railway corporations, and all consolidations must be either through a reorganized railway corporation or one originally

organized under the terms of the act. It is to be noted, also, that if a partial and voluntary consolidation is carried into effect it must be in harmony with and in furtherance of the complete plan established by the board. Sections 21 and 22 provide for the original incorporation of railway companies; and, concerning this part of the bill, it need only be remarked that any such corporation must be organized "for a specific and defined purpose, namely, the ownership, maintenance, and operation of one of the railway systems or for the construction, ownership, maintenance, and operation of new lines or systems into which the railroads of the United States are to be divided by the aforesaid board."

For the period of seven years after the act becomes a law, voluntary consolidations are authorized, under the strictest supervision by either the board or the commission. The distinctive feature of the voluntary as well as the involuntary consolidations is that the capitalization is not to exceed the actual value of the property held for or used in the transportation service. One of the chief causes leading to the public distrust of railway financing is the deep conviction on the part of the people that the present capitalization of many of the railways grossly exceeds the real value of the property which renders the service. When the Interstate Commerce Commission finishes the valuation in which it is engaged and when those values, as they are judicially determined and only those values, pass into the capitalization of the newly organized or reorganized corporations under this act, that serious obstacle in the way of effective regulation will have disappeared.

At the end of seven years after the passage of the act the compulsory consolidation begins. It is cur-

ried out as provided in section 13. If, during the seven years, voluntary consolidation has accomplished the purpose, this section, of course, will not be operative; but, during the voluntary period, its presence in the law will be a compelling force which, in the judgment of the committee, will stimulate the present railway companies to carry forward the declared policy of Congress.

The full advantages of the proposed policy of consolidation can not be secured for 10 or 12 years. The railways must be returned to their owners at once. This situation makes it necessary to provide a plan for immediate relief that will tend, at least, to overcome the difficulties confronting us and render private operation possible.

The sums which are to be paid to the transportation board are to be placed in a general railroad contingent fund, which is to be used by the board, together with all its accretions, "in furtherance of the public interest in railway transportation," "in avoiding congestions, interruptions, or hindrances to the railway service of the United States," or "in furthering the public service rendered by them (carriers), either by way of purchase, lease, or rental of transportation equipment and facilities to be used by such carriers whenever the public interest may require, or by way of loans to such carriers, upon such fair and reasonable terms and conditions, in either case, as the board may prescribe."

THE TRANSPORTATION BOARD.

Section 7 creates a new public authority for the regulation of commerce. Its title is "Transportation Board." It is to be composed of five members, until the consolidation heretofore mentioned is complete

and, thereafter, of three members. It is unnecessary to recite the details of its organization, for the bill itself is clear and explicit.

The first duty of the board is to prepare and, after hearing, adopt the plan of consolidation, which has been already fully set forth. Its general powers with respect to transportation are stated in the latter part of section 10, and these include certain functions now exercised by the Interstate Commerce Commission, among which may be mentioned the following: (a) The administration of the car service act; (b) of the safety appliance acts; (c) of the hours of service act; (d) of the locomotive boiler inspection act; and others of like character. It is also charged with a series of important duties relating to water transportation, mainly by way of investigation but leading to most important results. The committee hopes that this part of the bill will be carefully examined, for it is the first real recognition of the coordination of water and land transportation which must eventually be accomplished.

Section 11 confers further powers upon the board. These powers are new to our system of regulation but are considered by the committee as essential. They look toward unification in operation where conditions demand either a diversion of traffic or a common use of facilities.

The basis thus established has been the subject of much criticism. On the one hand, it is asserted by the carriers that it is too low and will not enable them to obtain the money which they must have in order to develop their properties and provide further transportation facilities which the country demands. On the other hand, it is asserted, with equal emphasis, by some advocates representing the shippers, that the

basis is too high and will give the carriers a greater revenue than they need or ought to have. There were differences of opinion in the committee with respect to the matter, and it is but fair to say that the basis presented is a compromise of these differences. It is believed, however, that both sides of the controversy somewhat exaggerate the facts, or, rather, fail to take into consideration all the facts which influence the subject. In reaching a conclusion, it ought to be borne in mind that the property to which the basis is to be applied is railway property only; that is, the property which renders the service of transportation. All outside investments by railway companies are excluded. Further, in valuing these properties the commission is to be guided by the rules of the law and is not bound by either capitalization or by what is commonly known in the accounting system of the commission as "property investment accounts."

Those who insist so earnestly that the basis will provide insufficient revenue generally ignore the fact that at the present time there are outstanding more than eleven billions of railway bonds which bear an average interest of about $4\frac{1}{2}$ per cent, and on that part of the value of the property the carriers will save 1 per cent. It must also be remembered that the $5\frac{1}{2}$ per cent basis for a rate district will not give to each carrier in that district $5\frac{1}{2}$ per cent upon the value of its property. To some carriers the return will be much higher and to others correspondingly lower. To illustrate: In the test period for ascertaining compensation under the act of March 24, 1918, the average net annual operating income of the class I railways was 5.2 per cent upon the aggregate property investment account. There are, however, wide differences

when the individual carriers are considered. Under this average, the New York Central System earned 6.09; the Pennsylvania Co., 6.26; the Pennsylvania Railroad, 5.36; the Delaware & Lackawanna, 7.54; the Erie, 3.56; the Baltimore & Ohio, 4.67; the Chicago, Burlington & Quincy, 7.02; the Chicago & North Western, 6.13; the Missouri Pacific, 4.43; the Union Pacific, 6.72; the Southern Pacific, 4.99; the Northern Pacific, 6.27; the Great Northern, 6.70; Atchison, Topeka & Santa Fe, 6.16; Chicago, Milwaukee & St. Paul, 4.71; Chicago, Rock Island & Pacific, 4.72; Chicago Great Western, 1.77; Chicago & Alton, 2.61; Western Pacific, 2.28; Colorado Southern, 3.04; Missouri, Kansas & Texas, 2.81; Texas Pacific, 3.76; Wabash, 2.91; Western Maryland, 2.58; New York, New Haven & Hartford, 5.96; Boston & Maine, 4.80; Cincinnati, Hamilton & Dayton, 1.95; Atlantic Coast Line, 5.76; Seaboard Air Line, 3.68; Southern Railway, 4.12; Louisville & Nashville, 6.32; Illinois Central, 5.48.

The basis adopted by the committee is three-tenths of 1 per cent higher than the basis of the test period; and, assuming, though not conceding, that the value of the property is equal to the aggregate of the property investment accounts, it will yield for all the railways a net operating income of \$54,000,000 in excess of the income of the test period.

There were two considerations which led the majority of the committee to believe that this increase is not only warranted but necessary:

First. The railways are being returned to their owners when everything is unsettled and abnormal; when there is suspicion and distrust everywhere. Just what rate of return will enable the carriers to finance themselves under such conditions can not, with certainty, be determined. It was, therefore, felt that some increase over the prewar period is justifiable.

Second. As compared with all kinds of commodities, money is much less valuable than it was a few years ago, and it would seem to be only fair that the returns from railway investments should be reasonably advanced.

The committee, however, recognized that the present situation may be temporary, and that in the course of time the country may be restored to something like its former circumstances, and it provided for this very probable change in the last paragraph of section 6, as follows:

That in the year 1925 and in every fifth year thereafter the commission shall determine what, under the conditions then existing, constitutes a fair return upon the value of such railway property, and it may increase or decrease the 5½ per centum basis herein prescribed, or the basis for the determination of excess income.

These are the reasons, in chief and in brief, which convinced the committee that the 5½ per cent basis for computing the annual operating income of the carriers is fair and just, both to the public and the railway corporations.

It is obvious that if the law gives to the carriers the assurance of income heretofore mentioned, there should be a maximum beyond which an individual carrier shall not be permitted to retain for its own use all it may receive under a given body of rates. Referring to the illustrations already given, it is seen that with uniform rates, and they must be uniform in competitive territories, one carrier will receive an operating income of 2 per cent, another 4 per cent, another 6 per cent, another 8 per cent, and others still more. The bill fixes a standard of excess income and requires the carriers which receive an excess

income (which will hereafter be explained in detail) to pay the excess to the transportation board for uses that have been mentioned and which will be more fully stated in a subsequent paragraph of this report.

Upon this requirement there has been a long-continued and earnest controversy before the committee. It has been contended by eminent lawyers that the provision is unconstitutional in that it takes property without compensation. It has been urged by equally eminent lawyers, and probably more of them, that it is not only constitutional but absolutely necessary if private ownership and operation are to be continued. It would unduly prolong this report to enter upon a review of the authorities or an argument which would embrace all the considerations which are material to the question. It is sufficient to say that a large majority of the members of the committee entertain no doubt with respect to the authority of Congress in establishing this policy. Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the States and with foreign nations that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of every community in the land. All the railways we have, or substantially all, must be maintained; and,

from time to time, they must be enlarged and additional facilities must be provided.

If the lawyers who insist that taking excess income is unconstitutional are right in their premises, their conclusion would be unassailable. They assume that all the earnings of a given railway under a prescribed body of rates become the absolute property of the carrier which receives them. This is not true under the system which the bill creates; and, therefore, the conclusion is unsound. If there were but one railway in the country, it would be entirely possible for the regulating commission to fix rates for it under which it could not earn more than 6 or 7 per cent upon the value of its property, but we have a thousand railways; and rates for transportation must be fixed with reference to all of them and to the needs of the people to whom all of them render their service. These conditions make it utterly impossible to fix rates which are reasonable for one carrier, considered apart from all the remainder. It is, therefore, in the competence of Congress to declare that the income which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property. If this analysis of the power of regulation is not sustained, then the authority granted in the Constitution is a mere delusion.

With reference to excess income, the bill provides that any carrier receiving a net railway-operating income in any year of more than 6 per cent upon the value of its property, one-half of the excess between 6 and 7 per cent is to be placed in a company reserve fund, and the remaining one-half is to be paid to the transportation board. Of any excess above 7 per cent, one-fourth is to be placed in the company

reserve fund, and the remaining three-fourths is to be paid to the board. When the reserve fund equals 5 per cent of the value of the railway property and is maintained at that amount, one-third of the excess above 6 per cent is to be at the disposition of the carrier for any proper purpose, and two-thirds is to be paid to the board.

The company reserve fund may be drawn upon by the carrier whenever its annual net railway operating income falls below 6 per cent of the value of its property. The reserve fund is, of course, the absolute property of the carrier; and the purpose in requiring it to be created and maintained is to give stability to the credit of the carrier and enable it to render more efficiently the public service in which it is engaged.

A REVIEW OF THIS PLAN.

In this regard the bill attempts to accomplish three results:

First: By prescribing a basis of return upon the value of the railway property, to give such assurance to investors as will incline them to look with favor upon railway securities; that is to say, by making a moderate return reasonably certain to establish credit for the carriers.

Second. In making the return fairly certain to secure for the public a lower capital charge than would otherwise be necessary.

Third. In requiring some carriers, which under any given body of rates will earn more than a fair return, to pay the excess to the Government and in so using this excess that transportation facilities or credit can be furnished to the weaker carriers and thus help to maintain the general system of transportation.

To bring about these results, section 4 requires the Interstate Commerce Commission immediately to divide the country into rate districts, having in view the similarity or dissimilarity of transportation and traffic conditions therein and to institute hearings to determine the adequacy of the rates in any such district from the revenue standpoint and considered as a whole. The rule to be applied in passing upon such issues is announced in section 6, wherein it is stated that the rates shall be so adjusted "as nearly as may be so that the railway carriers as a whole allocated to each district and subject to this act shall earn an aggregate annual net railway operating income equal, as nearly as may be, to $5\frac{1}{2}$ per centum upon the aggregate value, as determined in accordance with the provisions hereof, of the railway property of such carriers in the district held for and used in the service of transportation." To this basis the Commission is authorized to add, in its discretion, one-half of 1 per cent upon this value as a current contribution to improvements, betterments, or equipment unproductive in character, but which are customarily charged to capital account. This part of the revenue, however, if raised at all, is, in the future, not to be capitalized by any carrier whose net railway operating income for the year is more than the basis adopted; namely, $5\frac{1}{2}$ per cent.

In section 24 the board is also given control over the issuance of railway securities. It is deemed unnecessary to enlarge upon this subject, because it has been so often before Congress that we are all familiar with it in a general way. The car service act, which is to be administered by the board, is greatly enlarged; and, as now proposed to be amended, will be found in section 34. The thirteenth

paragraph of section 6 of the act to regulate commerce is amended in important particulars, and the administration of that paragraph is given to the board.

Section 45, an entirely new regulation, which is intended to increase our export and coastwise trade by making it easier for the interior shipper to avail himself of the ocean routes, is to be administered by the board.

Having thus indicated the chief duties and powers of the transportation board under the bill, it may be helpful to state some of the reasons which led the committee to the conclusion that it is wise to create this additional tribunal in our regulatory system instead of committing to the Interstate Commerce Commission all the new duties and leaving with it all its present duties.

Every member of the Senate knows that the Interstate Commerce Commission is the most overworked body of men in the Government of the United States; its members are able and industrious, and they labor continuously from the beginning to the end of the year. Nevertheless, they can not keep pace with the demands already made upon them, and, oftentimes, justice delayed is justice denied. The bill the committee has presented increases tremendously the work which some body of men must do if its provisions are promptly carried into effect. It was apparent to the committee that it must adopt one of two alternatives: It must either recommend a very considerable enlargement of the commission, with such division into sections as would permit independent action; or it must recommend the creation of a distinct body. It chose the latter alternative. In determining the division of work, power, and responsibility as between the two bodies, the committee has traced a clear, obvious line. It has not

been able, always, to observe the exact distinction; but, in the main, it has succeeded in doing so.

The bill leaves with the Interstate Commerce Commission the quasi-judicial powers; that is to say, everything pertaining to rates and rate-making will be as heretofore, in the hands of the commission. The valuation of railway property, under the act of 1913, remains with the commission. The accounting or reporting system is to be conducted by the commission as inseparable from rate making. There are many other and most important duties to be performed by the commission, so many, indeed, that the committee has some doubt whether it will be able to do its work promptly. These, however, need not be specified, as a reading of the bill and a familiarity with the existing law will disclose them. The transportation board is given, chiefly, the powers which are more nearly and directly connected with the physical operation of the railways and the issuance of securities, power over the things tending for safety, both to employees and the public. It is believed that the division of powers and duties has been so adjusted that opportunity for conflict or discord is practically excluded. It may be here remarked that one of the most vital powers given to the board relates to the settlement or adjudication of disputes between railway employers and employees; but this part of the bill deserves separate consideration and to that subject the committee now invites your attention.

LABOR PROVISIONS.

It is not necessary to enter upon the details of the establishment of the tribunals created for the adjudication of demands, disputes, and controversies which may arise from time to time between railway corporations and railway employees. These provi-

sions will be found in sections 25, 26, 27, and 28 of the bill. It is sufficient to say that there are to be appointed three regional boards of adjustment and a committee of wages and working conditions. These four tribunals, made up in each instance of an equal number of men nominated by railway crafts and railway corporations, have original jurisdiction of all complaints, demands, disputes, and controversies between employers and employees which are not adjusted or settled between the parties themselves. In the event of the failure of these boards of adjustment or the committee of wages and working conditions to reach a decision, the transportation board has final authority; and, indeed, all decisions of these boards or the committee must be approved by the transportation board. It is intended in these sections to bring into existence governmental tribunals so composed that, in so far as mortal man can do justice, there will be equal, i.e., impartial justice done to both railway corporations and railway employees and to the public as well.

Hitherto, the Government has not undertaken to adjudge the disputes which have so disturbed the field of transportation and which promise to be still more serious in the future than they have been in the past. All that legislation has done up to this time has been to authorize mediation and conciliation and to present an opportunity for voluntary arbitration. After the most careful consideration, it is the judgment of the committee that the time has come to make another advance in the settlement of disputes likely to end in the suspension or restraint of transportation. This forward step must be clearly understood in order to be justly considered. In a controversy between railway workers and railway managers with respect to wages and working condi-

tions and which could only be settled by agreement between the disputants, the right to strike, that is, a concerted cessation of work, seems inevitable; for it is the only weapon which the workers could effectually employ. A proposal to prohibit an agreement among workers to quit their employment at a given time without substituting some other instrumentality for securing justice would not receive at the hands of Congress a moment's consideration. In making the strike unlawful, it is obvious that there must be something given to the workers in exchange for it. The thing substituted for the strike should be more certain in attaining justice and should do what the strike can not do; namely, protect the great masses of the people who are not directly involved in the controversy. The committee has substituted for the strike the justice which will be administered by the tribunals created in the bill for adjudging disputes which may hereafter arise.

From the public standpoint and in the interest of the people generally, it has become perfectly clear that, in transportation, at least, both the strike and the lockout must cease. This country has been so developed, its population is so situated, its commerce so crystallized that regularity and continuity in transportation have become absolutely indispensable to the lives and health of the people and the existence of our industrial and commercial welfare. A general suspension in the movement of traffic for a fortnight would starve or freeze, or both, a very large number of men, women, and children; and, if it were continued a month or two months, it would practically destroy half our population. Our business affairs would be so disordered that the loss would be greater than in any conceivable war in which we might

engage. It is just as much the function of the Government in these circumstances to see to it that transportation is adequate, continuous, and regular as it is to maintain order, punish crime and render justice in any other field of human activity. It is clear, therefore, that the Government must settle the controversies between railway managers and railway employees which, if left to be fought out between the parties themselves, will lead to the consequences just described. There is but one way in which this can be done: The Government must undertake to declare, in any such case, what is justice, what is fair and right, between the parties to the dispute, and then there must be no concerted rebellion or conspiracy among those whose rights have been adjudged for the purpose of coercing either of the parties to the dispute into another and different settlement.

The railway unions are especially opposed to these provisions of the bill, and the committee addresses a word directly to them. In the step the committee has taken there is no hostility to unionized labor; no opposition to collective bargaining. Indeed, the unions and collective bargaining are necessary parts of the plan suggested in the bill. The unions can be more effective in securing justice under the proposed arrangement than they ever have been through the strike, for after all, even the most zealous of the union leaders must admit that their efforts through the strike, from their own standpoint, have substantially failed. The existing complaints with respect to wages and working conditions must be sufficient evidence to these leaders that they have not been able to attain their objects in the old way. Why not, then, exchange the instrumentality which they are now insisting upon and which can be tolerated no longer

in a free country for a better one; namely, the justice of an impartial governmental adjudication? The committee is aware that the union leaders feel that they can not hope for justice from the Government, but in the opinion of the committee this distrust has no foundation and ought to give way to confidence and hope. If we can not organize tribunals which will do justice to employees, employers, and to the public in a business which so vitally affects the welfare of the Nation, then the Government is a complete failure and free institutions must be abandoned as an unsuccessful experiment. The committee believes that, when the heat of the immediate conflict over this legislation has subsided, a great majority of the railway workers will hail the substitution of intelligent and impartial tribunals, which will render justice to them, for the right to enter into an agreement or combination to destroy transportation as a deliverance, and as a better way to secure what rightly belongs to them than the methods which they have heretofore employed.

The committee has now reviewed those parts of the bill which propose legislation along lines distinct from those which have been already attempted. There are in the bill many amendments of the act to regulate commerce remedying defects which have been disclosed in the administration of the present law; but it is believed that these corrections need not be specifically enumerated in this report. When the bill is presented in debate, all these matters will be carefully explained.

It is but fair to say that this report has not been considered by the committee. It is the work of the chairman, and he alone must be held responsible for it.



STATE OF TEXAS *v.* EASTERN TEXAS RAILROAD
COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS.

STATE OF TEXAS ET AL. *v.* UNITED STATES,
McCHORD ET AL., CONSTITUTING THE IN-
TERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS.

Nos. 298 and 563. Argued November 15, 16, 1921.—Decided March
13, 1922.

1. Where a statute is susceptible of two constructions, one raising grave and doubtful constitutional questions and the other not, it is the duty of the court to adopt the latter. P. 217.

Argument for Appellants.

2. Paragraphs 18-20 of § 1 of the Act to Regulate Commerce, added by § 402 of the Transportation Act of 1920, which regulate the construction and acquisition of new lines of railroad and the extension and abandonment of old lines, are not to be construed as clothing the Interstate Commerce Commission with authority over the discontinuance of the purely intrastate business of a railroad whose situation and ownership are such that interstate and foreign commerce will not be affected by that business. P. 218.

Reversed.

THE first of these cases is an appeal from a decree of the District Court for the Western District of Texas dismissing a suit removed from a court of that State, in which the State of Texas sought to enjoin the above-named railroad company and some of its officers from ceasing to operate its road in intrastate commerce. The other is an appeal from a decree of the District Court for the Eastern District of Texas dismissing the bill in a suit brought by the State and its Attorney General, in that court, against the United States, the members of the Interstate Commerce Commission, the United States Attorney General, and the above-named and two other railroad companies, to annul an order and certificate of the Interstate Commerce Commission purporting to permit the abandonment of the same railroad line upon certain conditions.

Mr. Tom L. Beauchamp, with whom *Mr. C. M. Cureton*, Attorney General of the State of Texas, *Mr. Bruce W. Bryant* and *Mr. Wallace Hawkins* were on the briefs, for appellants.

Under the authority given by the statute, it may be said that the power of the State to forbid extensions has been superseded. It may with good reason be argued that extensions become necessary to interstate commerce whether agreeable to the State in which they are made or not, and this may be given as a reason for the insertion of paragraph 21, authorizing the Commission to require them. If that same argument applied to abandonments,

paragraph 21 should then have included abandonments, as well as extensions, but it does not.

Congress did not intend by the act to exclude the authority of the State. The full purpose is served and the language of the law has been complied with when the Interstate Commerce Commission gives to the carrier its authority to abandon the operation of its line as an interstate carrier, leaving it then to be dealt with by the State creating the corporation and to which it owes its existence and with which it has a charter contract and obligation.

If the acts of the Commission under paragraphs 18-22 are judicial, the paragraphs are unconstitutional. This is determined by the matter at issue before them and its nature and not the nature of the Commission.

A State may control the physical properties of its private corporations and make rules and regulations therefor in accordance with the terms of their charter contracts, and the laws of the State which enter into and become a part of them, so long as such action does not become a direct burden on interstate commerce or embarrass Congress in the exercise of any power with which it is invested by the Constitution. *Baltimore & Ohio R. R. Co. v. Maryland*, 21 Wall. 456, 473; *Northern Securities Co. v. United States*, 193 U. S. 347; *Gibbons v. Ogden*, 9 Wheat. 1, 206, 208.

When the Federal Government, acting through Congress or its committee or commission, designated the Interstate Commerce Commission, withdraws the patronage of interstate commerce from the Eastern Texas Railroad, it has reached the limit of its authority. *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677, 702; *Northern Securities Co. v. United States*, *supra*; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262. Is it conceivable that the State, having a commerce over which it exercises exclusive control, cannot control a corporation engaged in such commerce?

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Though the Eastern Texas retains its corporate name, it has lost its corporate identity; though its obligations to the State of Texas have not been fulfilled, it has nevertheless become a part of the system of the St. Louis Southwestern Railway Company and is subject to all of the laws of the State and of the United States governing it as a part of the system of the St. Louis Southwestern Railway Company. *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association*, 247 U. S. 490.

The Interstate Commerce Commission has no authority under the statute to grant to a railroad company a certificate of public convenience and necessity authorizing it to abandon a part of its main line track in the absence of a showing that the entire system was losing money. *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574.

Mr. E. B. Perkins, with whom *Mr. Daniel Upthegrove* and *Mr. E. J. Mantooth* were on the briefs, for appellee railroad companies.

Mr. Solicitor General Beck for the United States, in No. 563. *Mr. Robert P. Reeder* was on the brief.

If the construction advanced by Texas be accepted, this portion of the Transportation Act loses its chief efficacy, because of the unified character of the business of transportation for most practical purposes. If the Interstate Commerce Commission only had power to authorize the carrier to abandon its interstate business and were impotent to give like authority to abandon its intrastate commerce, then in most cases the certificate of authority would not be worth the paper it was written on. For a railroad corporation does not abandon its railway unless the business has ceased to be profitable and, if the business be unprofitable when the railroad has the advantage of revenue from both interstate and intrastate traffic, it

would be even more so if it abandoned only one part of its business. In such event its income would be lessened but its expenses would not be appreciably diminished.

To require the consent of both the Interstate Commerce Commission and the State Railroad Commission would mean the very conflict of authority which the law sought to avoid by explicitly providing that the carrier may act upon the certificate of the Commission.

Having given the State, as it were, its day in court, the act (paragraph 20) provides that the Commission in issuing the certificate "may attach . . . such terms and conditions as in its judgment the public convenience and necessity may require." It was evidently intended that the Commission should take into account the just claims of the State. Indeed, the question of public convenience and necessity is left to the Commission. The act does not say that the certificate may contain such terms and conditions as the interest of the interstate commerce or even of the Federal Government may require; it is the public convenience and necessity that the Commission is to consider.

Then follows the significant statement that the carrier may, without securing approval other than such certificate, comply with the terms and conditions and proceed with the construction, operation, or abandonment covered thereby.

What can this mean except the authority to go ahead with the extension or abandonment without consulting any other authority?

The State may not seriously claim that the Eastern Texas Railroad should continue operations at a loss. *Bullock v. Railroad Commission*, 254 U. S. 513; *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396.

If Congress may directly or through appropriate agencies condemn defective or inadequate equipment and facilities of interstate carriers irrespective of the nature of

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the traffic, whether interstate or intrastate, *a fortiori*, it may authorize a railroad engaged in interstate transportation, which consists mainly of an accumulation of all or many of these things, to cease operations.

If the commerce power be not broad enough to determine whether an interstate carrier, even though incorporated under the laws of the State, may abandon its business for lack of public patronage as an entirety, and without respect to the division between interstate and intrastate commerce, then it is obvious that our political institutions are not in harmony with the present conditions of human society.

The banks, in loaning their credit and furnishing the necessary means of constructing the railroad, take no account of the legal distinction between interstate and domestic commerce. The contractors, engineers, and builders of the road are also unable to regulate their operations by such distinction. So of organized labor; it deals with a system as a whole.

The very act of transportation again illustrates the indivisibility from a practical standpoint and not as a legal abstraction of this indivisible thing that we call commerce.

If, therefore, this legal distinction which seeks to make a duality of an essential unity does not conform to the nature of these economic forces, then it is obvious that our political institutions are lagging behind the economic forces which they are designed to protect and promote. Fortunately, there is no such rigidity.

This court has always recognized that, as human society became more concentrated and complicated, all powers, federal and state, have a necessary reaction upon each other. With or without political institutions, steam and electricity have woven the commercial intercourse of the country into substantial unity, and this unity is therefore an indivisible unity. Therefore, it was futile for the

political government in solving many practical problems to attempt to make any division. A full century after the Constitution was adopted Congress, yielding not merely to the so-called granger movement but to the widespread desire of citizens of all classes, passed the first interstate commerce law; and from that time to the passage of the Transportation Act, legislation has been a series of advancing steps whereby Congress, in behalf of the whole Nation, seeks to end the abuses of transportation and to regulate the commerce of the Nation. To legislate with reference to interstate commerce without assuming an incidental but necessary control over intrastate commerce, had become impracticable with the progress of human society.

This court has recognized in many cases as a concrete proposition that Congress has full and plenary power to regulate interstate carriers as instrumentalities of commerce and that this power can not be lessened, hampered or obstructed by the consideration that, of necessity, these interstate carriers are likewise engaged in intrastate business, and that intrastate business is necessarily affected. If the duality of interstate and intrastate commerce be longer a fact, then they are as the Siamese twins, two bodies and yet united by a common ligature.

The Government, apart from its power under the commerce clause, owes to these corporate instrumentalities of commerce a direct obligation, due to the fact that they were taken by the Government for public use, and all the obligations that arise under that public use must be met by the power under which they were taken over, the war power.

This power was assumed not merely to carry on the war, but at the present time the Government, because it utilized the railroads to carry on the war, has become a creditor to the extent of many millions of dollars of the corporate instrumentalities which it operated. It has the

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power, like any other lien creditor, before it releases the property, to which it must look as security for the amounts due it, to see that that property is not sacrificed by undue regulation.

The Government's claim rises higher than that of a mere creditor. Under the Transportation Act it has guaranteed for a period of six months the standard return to the railroads as measured by prewar experience, and it has further directed the Commission, in order to rehabilitate the railroads, that it shall authorize rates that will enable the railroads to secure for a period of years an adequate return upon their investment. If, during such period of rehabilitation, Congress provides that a railroad should not increase its obligations by extending its lines, or, on the other hand, should not lessen the value of the security by abandoning its road, or should not increase the guaranty of the Government by running the road at a loss, why is not such an exercise of power the exercise of the war power and as such an appropriate means to discharge the important duty of rehabilitating the railroads, which suffered such grievous injury during the period of governmental control?

If Congress has power to provide adequate transportation for interstate commerce and to that end may protect the credit of the carriers by supervising and regulating the issue of their securities and the expenditure of the capital funds, why may it not for the same purpose prevent unwise expenditures for unnecessary extensions and the absorption of their means and the destruction of their credit through the continued operation of unnecessary lines? The power to regulate presupposes the existence of the thing to be regulated and would be void without the power to "foster" and "protect" it. If a State may prevent an abandonment of a line within its borders which is in the opinion of Congress sapping the resources of an instrumentality of commerce, or is reducing its

capacity and usefulness, the State may impair or destroy this instrumentality of interstate commerce and thus destroy interstate commerce itself.

Mr. Walter McFarland, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By § 402 of the Transportation Act of 1920, c. 91, 41 Stat. 456, 477, several new paragraphs were added to § 1 of the Act to Regulate Commerce as theretofore amended. Paragraphs 18, 19 and 20 are copied in the margin.¹ By

¹(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and

them Congress has undertaken to regulate the construction and acquisition of new or additional lines of railroad and the extension and abandonment of old lines, and to invest the Interstate Commerce Commission with important administrative powers in that connection. Like the act of which they are amendatory, these paragraphs are expressly restricted to carriers engaged in transporting persons or property in interstate and foreign commerce.²

Our present concern is with the provisions relating to the abandonment of existing lines. They declare that

said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

² See amended paragraphs (1) and (2) of the Act to Regulate Commerce as set forth in § 400 of the Transportation Act of 1920.

" no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment " (par. 18); that when application for such a certificate is received the Commission shall cause notice thereof to be given to the Governor of the State wherein the line lies and published in newspapers of general circulation in each county along the line, and shall accord a hearing to the State and all parties in interest (par. 19); that the Commission may grant or refuse the certificate in whole or in part and impose such terms and conditions as in its judgment the public convenience and necessity require; and that when the certificate is issued, and not before, the carrier may, " without securing approval other than such certificate," comply with the terms and conditions imposed and proceed with the abandonment covered by the certificate (par. 20).

The Eastern Texas Railroad Company, a Texas corporation, owns and operates in that State a line of railroad 30.3 miles in length. Approximately three-fourths of the traffic over the road is in interstate and foreign commerce and the rest is in intrastate commerce. The company neither owns nor operates any other line. The road was constructed in 1902 to serve extensive lumber industries, but in subsequent years the adjacent timber was removed and the mills dismantled. The company claims that since 1917 the road has been operated at a loss.

On June 3, 1920, the company filed with the Commission an application for a certificate authorizing it to abandon and cease operating its road, full notice of the application being regularly given. The State declined to appear before the Commission, but others, who were being served by the road, appeared and opposed the application. A full hearing was had and, on December 2, 1920, the

Commission made and filed a report concluding as follows: "Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of the applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of \$50,000. A certificate and order to that effect will be issued." The certificate and order were issued and the railroad company indicated its assent to the condition imposed, but, so far as appears, no one sought to purchase under the condition.

While the application was pending before the Commission and before the certificate was issued, the State brought a suit in one of its courts against the railroad company and some of its officers to enjoin them from ceasing to operate the road in intrastate commerce. The bill was brought on the theory that under the laws of the State the company was obliged to continue the operation of the road in intrastate commerce; that the provisions of the Transportation Act were unconstitutional and void, if and in so far as they authorized the abandonment of such a road as respects intrastate commerce, and that the company in asking the Commission to sanction such an abandonment was proceeding in disregard of its obligations to the State. At the instance of the defendants the suit was removed to the District Court of the United States for the Western District of Texas. During the pendency of the suit the Commission issued the certificate and the defendants then sought the benefit of it by a supplemental answer. The court held that the certificate constituted a complete defense, and without a hearing on other issues dismissed the suit. The State appealed directly to this court. That appeal is No. 298.

After the Commission granted the certificate the State brought a suit in the District Court of the United States

for the Eastern District of Texas against the United States, the railroad company and others to set aside and annul the Commission's order and certificate on the grounds, first, that the provisions of the Transportation Act, rightly interpreted, did not afford any basis for granting a certificate sanctioning the abandonment of the company's road as respects intrastate commerce, and, secondly, if those provisions purported to authorize such a certificate, they were to that extent in excess of the power of Congress and an encroachment on the reserved powers of the State. The defendants moved to dismiss the bill as ill founded in point of merits, and the court sustained the motions and entered a decree of dismissal. The State appealed directly to this court. That appeal is No. 563.

Counsel attribute to these cases a breadth which they do not have; and for obvious reasons we shall deal with them as they are, not as they might be.

Up to the time the Commission made the order granting the certificate a part of the commerce passing over the road was interstate and foreign, that is, was bound to or from other States and foreign countries. It is not questioned that Congress could, nor that it did, authorize the Commission to sanction a discontinuance of this interstate and foreign business. Neither is it questioned that the Commission's certificate was adequate for that purpose. The only matters in controversy are whether, by paragraphs 18, 19 and 20, Congress has assumed to clothe the Commission with authority to sanction the entire abandonment of a road such as this, and, if so, whether the power of Congress extends so far.

The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will

any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.

If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407-408.

Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce. *Minnesota Rate Case*, 230

U. S. 352, 418; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563. And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared. This was not done.

These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business.

Whether, apart from the Commission's certificate, the railroad company is entitled to abandon its intrastate business is not before us, so we have no occasion for considering to what extent the decisions in *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396, and *Bullock v. Railroad Commission of Florida*, 254 U. S. 513, may be applicable to this road.

As the District Courts both accorded to the Commission's certificate a wider operation and effect than can be given to it consistently with the provisions of paragraphs 18, 19 and 20 as we interpret them, the decrees must be reversed and the causes remanded for further proceedings in conformity to this opinion.

Decrees reversed.